General at all times herein mentioned has acted and continues to act solely upon the conclusion that there is reasonable cause to believe that if petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States. Petitioner denies that there is reasonable or any cause for such conclusion or for such belief, denies that he has engaged at any time in any such activities or conduct, and specifically denies that he will engage in or plans, intends, contemplates, proposes or considers engaging in, if enlarged on his bond, any activities or conduct which would be prejudicial to the public interest or would endanger the welfare or safety of the United States. Petitioner has never been informed or advised by the Attorney General or by any agent or subordinate of the Attorney General of the facts, if any, upon which the Attorney General bases the conclusion that there is reasonable cause [fol. 17] to believe petitioner, if enlarged, would engage in such activities; nor upon what past activities of petitioner, if any, the Attorney General relies for such conclusion; nor what activities the Attorney General anticipates would be engaged in by petitioner if he should be enlarged; nor in what respect such activities if engaged in are deemed by the Attorney General to be prejudicial to the public interest or to endanger the welfare and safety of the United States. Petitioner further alleges that repeatedly since his said arrest on October 21, 1950, he has requested such information of said District Director as agent of the Attorney General and that said District Director at all times since October 21, 1950, has failed and refused to furnish such information or any information whatever with respect to the reasons for petitioner's detention.

Dated: This 6th day of November, 1950.

Margolis and McTernan, By (S.) John W. Porter, R.S.R., Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to order to show cause why writ of habeas corpus should not be granted in the above entitled case, respectfully states:

I

That Frank Carlson, also known as Solomon Skolnick, hereafter referred to as the petitioner is not being illegally restrained by me of his liberty, but is in my custody under proper and lawful authority.

II

That the said petitioner is in my custody pursuant to a warrant of arrest, dated October 31, 1950, issued by authority of the Attorney General, directing that the petitioner be taken into custody and granted a hearing to enable him to show cause why he should not be deported in conformity with law, a certified copy of which is attached hereto as a part of this return and marked Exhibit "A".

III

That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

[fol. 19] Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the said petition for issuance of a writ of habeas corpus in the case of the petitioner be denied.

(S.) Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Duly sworn to by Herman R. Landon. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO RETURN

United States of America

Department of Justice

Immigration and Naturalization Service

Los Angeles, California

November 6, 1950.

CERTIFICATION

By virtue of the authority vested in me by 8 C.F.R. 373.7, a regulation issued by the Commissioner of Immigration and Naturalization with the approval of the Attorney General pursuant to 5 U.S.C. 22 and 311, and 8 U.S.C. 102, 222, 458 and 727,

I hereby certify that the annexed document, a Warrant of Arrest, is a true copy of the original thereof from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Salomon Sokolnick, File No. 245-P-76468, of which the Attorney General is the legal custodian.

In witness whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

Herman R. Landon, District Director, Immigration and Naturalization Service. (Seal.)

[fol. 21] Warrant

For Arrest of Alien

United States of America

Department of Justice

Los Angeles, Calif.

A-5634646

No. 245-P-76468

To District Enforcement Officer, Los Angeles, California or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Salomon Sokolnick alias Solomon Skolnick or

Sol Skolnick alias Frank Carlson who entered this country at New York, New York on the 23rd day of August 1920 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, here-[fol. 22] under, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 20th day of October, 1947.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

Endorsed: Filed Nov. 6, 1950. Edmund L. Smith, Clerk, by Wm. A. White, Deputy Clerk.

Acknowledgment of Service

Receipt is hereby acknowledged this 6th day of November, 1950, of a copy of the Return to Order to Show Cause Why Writ of Habeas Corpus Should not be Granted, in the above-entitled and numbered case.

John W. Porter, Attorney for Petitioner, by (S.) John W. Porter.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PORTIONS OF RETURN TO ORDER TO SHOW CAUSE—Filed November 17, 1950

Frank Carlson, petitioner herein, hereby moves the above entitled Court to strike from the Return of Herman R. Landon to the order to show cause herein the following portions thereof, upon the ground that the same are, and each of them is sham, irrelevant, not a factual response, and a mere conclusion:

(1) All of paragraph I thereof.
(2) All of paragraph III thereof.

Said motion is based upon the petition of petitioner herein, the attached memorandum of points and authorities, and all of the other records and files herein.

Dated: November 6, 1950.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

ANSWER TO RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 7, 1950

Comes now Frank Carlson, petit-oner herein, and for his answer to the Return of H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, respondent herein, admits, denies and alleges as follows:

I

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to constitute a return to the order to show cause herein.

II

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to show any cause why the writ prayed for by the petitioner, on file herein, should not be granted, and fails to set forth any fact whatever responsive to said order to show cause.

III

Answering paragraph I of said Return, denies that petitioner is not being illegally restrained of his liberty by respondent, and denies that petitioner is in the custody of respondent under proper and lawful authority.

IV

Answering paragraph II of said Return, admits that [fol. 25] petitioner is in the custody of respondent under color of a warrant of arrest dated October 31, 1950, a certified copy of which warrant is attached to said Return and marked Exhibit A, and alleges that such custody is unlawful and an abuse of discretion on the part of respondent and of the Attorney General of the United States.

V

Answering paragraph III of said Return, denies that there is reasonable or any cause to believe that if petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States, and in connection therewith refers to and by this reference incorporates herein as if fully set forth each and all of the denials and allegations set forth in his amendment to the Petition for Writ of Habeas Corpus on file herein, designated paragraph XVIIIA thereof.

VI

Refers to the allegations of his Petition for writ of Habeas Corpus on file herein, set forth in paragraphs I to XX inclusive, and by this reference incorporates each and all of the allegations thereof as if the same were fully set forth herein.

Wherefore, petitioner prays that a writ of habeas corpus issue and that he be forthwith restored to his liberty upon [fol. 26] reasonable bond.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

(Affidavit of Service by Mail.)

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL AND DISPOSITION OF CASE

At a stated term, to wit: The September Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Ben Harrison, District Judge.

In Re: Frank Carlson, aka Solomon Skolnick, No. 12,491—BH—Civil

In Re: Miriam Christine Stevenson, etc., No. 12,492—BH—Civil

In Re: Harry Carlisle, aka Harry Carlyle, No. 12,503—BH—Civil

In Re: David Hyun, No. 12,505—BH—Civil

(Same order in each case:) At 2 P.M. court convenes herein and each of the petitioners appearing by their counsel of record, and Walter S. Binns, Ass't. U.S. Att'y, appearing as counsel for respondent;

Written stipulation for submission of action is presented and filed.

The Court, at this time, states that an Opinion of the Court will later be filed, and orders the Writ discharged. Counsel for respondent is directed to prepare and present proposed order discharging the Writ, for signature.

Application is made on behalf of petitioner that the Court fix the amount of bail pending appeal, and the Court orders said application denied.

[fol. 28] IN UNITED STATES DISTRICT COURT

STIPULATION FOR SUBMISSION OF ACTION—Filed November 10, 1950

It is hereby Stipulated by and between the undersigned counsel for the petitioner and for the respondent herein that:

(1) The above entitled matter has been submitted to the Court upon a record consisting of:

(a) The Petition for Writ of Habeas Corpus, as amended with leave of the Court, by the Amendment to Petition for Writ of Habeas Corpus;

(b) The Order to Show Cause why writ of habeas corpus should not issue;

(c) The respondent's Return to the Order to Show Cause Why Writ Should Not Be Granted;

(d) The petitioner's Motion to Strike Portions of Return to Order to Show Cause;

(e) The petitioner's Answer to Return to Order to Show Cause Why Writ Should Not Be Granted;

(f) This Stipulation.

(2) The Motion to Strike Portions of Return to Order to Show Cause has been denied.

(3) The petitioner waives oral testimony in support of the petition and Answer and submits the matter upon the foregoing record and stipulation, without offering any oral testimony, notwithstanding that the Court has offered to receive such testimony.

[fol. 29] (4) For the purpose of this record it is deemed that a writ of habeas corpus has been issued and that hearing has been had upon a return to the writ. For said purpose the Return to Order to Show Cause Why Petition For Writ of Habeas Corpus Should Not Be Granted and the Answer thereto are deemed the return and traverse to the writ. The determination upon this hearing shall be either that the writ is granted or that the writ is discharged.

Dated: November 9, 1950.

Margolis and McTernan, by (S.) John W. Porter,
Attorneys for Petitioner.

Ernest A. Tolin, United States Attorney. (S.) Walter S. Binns, Chief Assistant United States Attorney.

Ray H. Kinnison, Assistant United States Attorney, Chief of Criminal Division, Attorneys for Respondent. H. R. Landon, District Director.

[File endorsement omitted.]

[fol. 30] In the District Court of the United States, Southern District of California, Central Division

No. 12491—BH

In the Matter of Frank Carlson, Also Known as Solomon Skolnick, Petitioner for Writ of Habeas Corpus

No. 12492—BH

In the Matter of Miriam Christine Stevenson, Formerly Burroughs, nee Kenkel, alias Miki Ashton, Petitioner for Writ of Habeas Corpus

No. 12503—BH

In the Matter of Harry Carlisle, Also Known as Harry Carlyle, Petitioner for Writ of Habeas Corpus

No. 12505—BH

In the Matter of David Hyun, Petitioner for Writ of Habeas Corpus

Opinion—Filed November 10, 1950

Appearances:

Margolis & McTernan, by John W. Porter, 112 West Ninth Street, Los Angeles 15, California, for Petitioner Frank Carlson.

Rose S. Rosenberg, 112 West Ninth Street, Los Angeles 15, California, for Petitioner Miriam Christine Stevenson. [fol. 31] Stanley Fleishman, 1614 North Argyle Avenue, Hollywood 28, California, for Petitioner Harry Carlisle.

Milton S. Tyre, 650 South Grand Avenue, Los Angeles 17, California, for Petitioner David Hyun.

A. L. Wirin, 416 Douglas Building, Los Angeles 12, California, Amicus Curiae.

Ernest A. Tolin, United States Attorney; Walter S. Binns, Chief Assistant United States Attorney; Ray H. Kinnison, Assistant United States Attorney; Howard L. Field, District Adjudication Officer, U. S. Immigration and Naturalization Service, Department of Justice, U. S. Post Office and Court House, Los Angeles 12, California. Attorneys for Respondent.

In the above entitled habeas corpus proceedings which were initiated to secure the release on bail of several aliens held without bail by the immigration authorities pending final determination of their cases, an order to show cause was issued and a return thereto filed by the Attorney General. The petitioners, through oral argument and by means of briefs presented to the court, contend that the return to the order to show cause is insufficient and that they are entitled to their discharge on the state of the record as a [fol. 32] matter of law. The return contained a copy of the warrant of arrest wherein the petitioners were retained in custody under authority of Section 156, Title 8 U.S.C.A., as amended by the Internal Security Act of 1950 (U.S. Congressional Service p. 3740-3762). Said section as amended in part reads as follows:

> "* * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; (3) be released on conditional parole. * * *"

The government contends that this provision of the law as amended gives the Attorney General *absolute* discretion in the matter of bail, and that this court has no jurisdiction to review the exercise of this discretion.

The court cannot accept the contention of either of the parties. I am of the opinion that the amendments, insofar as material to this matter, were a legislative adoption of

clarifying language read into the original Section 156 by certain rulings of the Second Circuit, and not a change in the law giving the Attorney General absolute discretion. In U. S. ex rel. Zapp v. District Director etc., 120 F. (2d) 762, (2nd Cir.), reading at page 765 the following language [fol. 33] is used:

> "The natural interpretation of the language used, that the alien 'may be released under a bond', would indicate that the release is discretionary with the Attorney General; * * *"

This same view of the discretionary power of the Attorney General was reiterated and more clearly defined in U. S. ex rel. Potash v. District Director etc., 169 F. (2d) 747 (2nd Cir.), wherein the court stated:

> "The foregoing decisions and also, as it seems to us, the general spirit of our institutions make it improbable that Congress intended to give the Attorney General unlimited power over the admission to bail of aliens against whom deportation proceedings are brought. We think that it requires more than the general grant of power to fix bail in Section 156 to exempt the Attorney General from all control in the exercise of that function even if he should be shown to have acted in an arbitrary manner. This interpretation is particularly indicated in such a situation as the present where personal liberty is involved and there has been no determination that the alien is deportable."

[fol. 34] The language of these decisions together with a careful comparison of the language of the respective statutes indicates that no such grant of power as is contended for by the government was given by the amendments to 8 U.S.C.A. 156 contained in the new Internal Security Act of 1950. It would have been a comparatively simple matter for Congress to indicate an intent to give such power to the Attorney General. There is nothing in the legislative history, however, to show that Congress did intend such exclusive right. The Zapp case established that the admission to bail was discretionary with the Attorney General. The Potash case held that such discretion is not an unbridled one.

It is equally clear since the Potash case, supra, that one who claims an abuse of such discretion has the burden of proving abuse by clear and convincing evidence. This is clearly set forth at page 751:

"* * * The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail. However, in any consideration of his denial of bail it should always be borne in mind [fol. 35] that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General *where the alien makes a clear and convincing showing* that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative determination is final. If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed." (Emphasis supplied)

In approaching questions involving the admission or expulsion of aliens it should be remembered, and it has been repeatedly affirmed by the courts, that this function may be conferred upon the executive branch of the government by the Congress and the judiciary has only such authority to interfere as may be delegated to it.

In Wong Wing et al. v. U. S. 163 U. S. 228, 16 S. Ct. 977, the court stated:

"But this court held, in the case of Fong Yue Ting v. U. S., 149 U. S. 698, 13 S. Ct. 1016, that the right to [fol. 36] exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of

every sovereign and independent nation; that the power of congress to expel, like the power to exclude, aliens or any class of aliens from the country, may be exercised entirely through executive officers; and that the said sixth section of the act of May 5, 1892, was constitutional and valid.

* * * * * * *

"'The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'"

The same thought is expressed in U. S. ex rel. Carapa v. Curran etc., 297 F. 946 (2nd Cir,), where the following language is used:

"It is, however, to be observed that the provision above quoted applies to the case of a person arrested or imprisoned on process issued from any court of the United States in any civil action. An alien who is denied the right to enter the United States and who is [fol. 37] held by the immigration authorities for deportation is not held on process issued 'from any court of the United States in any civil action'. On the contrary, he is held by the immigration authorities under authority conferred upon them by the act of Congress regulating immigration. The deportation proceeding is sui generis, and the authority of the immigration officials is not derived from the courts as the result of any civil action whatever. If a District Court, on an application for a writ of habeas corpus, *inquiries* into the legality of a deportation order and finds that the immigration authorities have not exceeded their authority but that they have proceeded lawfully and has remanded the alien to their custody, he is in their custody, not because of any authority which those officials have derived from the court but under the authority conferred upon the Executive by the acts of Congress.

"The power to admit to bail is not a mere matter of practice. In the United States the right to bail is

thought to be dependent on statutes. 3 Am. & Eng. Encyc. of Law 591; 6 C.J. 894."
(See also 3 C. J. S. 590 et seq.)

In 1904 in the case of U. S. ex rel. John Turner v. William Williams etc. 194 U.S. 279, 24 S. Ct. 719-724, involving an anarchist. Mr. Chief Justice Fuller, speaking for the court, [fol. 38] among other things said:

"* * * The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human *governments* endure they cannot be denied the power of self-preservation, as that question is presented here."

Both in U.S. ex rel. Zapp v. District Director etc., supra, and U. S. ex rel. Potash v. District Director etc., supra, it is to be noted that one of the factors to be considered in determining the admissibility of an alien to bail is the danger to the community by the presence of the alien. I assume the same rule that applies to one who has smallpox applies as well to an alien who is being held pursuant to a warrant for his arrest charging him with being deportable because of membership in an organization that advocates the overthrow of the government by force and violence. Both are menaces to public safety and security.

In the instant cases the court repeatedly, following the reasoning of the Potash case, invited petitioners to produce any evidence that would rebut the presumption of regularity flowing from the issuance of the warrant attached to the return. This warrant stated that the Attorney General was holding the petitioners without bail pending deportation proceedings because of their membership in the Communist Part of the United States. Such evidence was essential to overcome the presumption and to prove an abuse of discretion by the Attorney General. All refused [fol. 39] to prefer any evidence whatsoever and stated through counsel that they rested their cases upon the written record. Thus the court had before it no evidence whatsoever upon which it could make any findings on the question of the abuse of discretion.

The court must assume that the acts of the Attorney General were regular and free from any abuse of discretion in the absence of evidence to the contrary. It cannot override the opinion of the Attorney General where the

alien fails to make a clear and convincing showing that the decision against him is without reasonable foundation.

The petitions for writ of habeas corpus are hereby discharged.

The United States Attorney is directed to prepare forthwith for my signature proper orders of dismissal in conformity with the opinions herein expressed.

Dated: This 10 day of November, 1950.

(S.) Ben Harrison, Judge.

[File endorsement omitted.]

[fol. 40] IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12491-BH

In the Matter of FRANK CARLSON, also known as SOLOMON SKOLNICK, Petitioner for Writ of Habeas Corpus

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT—November 13, 1950

The above-entitled matter came on regularly for hearing on an Order to Show Cause why a petition for writ of habeas corpus should not be granted on November 7, 1950 in the above-entitled Court before the Honorable Ben Harrison, the petitioner being represented by his counsel, Margolis and McTernan, and the respondent by his counsel, Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns and Ray H. Kinnison, Assistant United States Attorneys; and the Court having read the petition and the return on file and heard arguments, and the parties by their attorneys having stipulated that a writ of habeas corpus be deemed to have issued and that the return on file be considered as the return to said writ; and the petitions as amended be deemed a traverse by petitioner; and it being further stipulated that the petitioner did not desire to pre-[fol. 41] sent evidence in support of the traverse;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed, and that

the writ of habeas corpus issued herein be and hereby is discharged.

Dated: November 13, 1950.

(S.) Ben Harrison, United States District Judge.

Approved as to form: Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

Judgment entered Nov. 13, 1950. Book 69, Page 181. Edmund L. Smith, Clerk, by C. A. Simmons, Deputy.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 13, 1950

Notice is hereby given that Frank Carlson, petitioner above named hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order discharging the writ of habeas corpus herein, made and entered in this action by the United States District Court, Honorable Ben Harrison, Judge Presiding, on the 13th day of November, 1950.

Dated: This 13th day of November, 1950.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

Received copy of the within Notice of Appeal this 13th day of November, 1950.

Ernest A. Tolin, U. S. Attorney, by (S.) Walter S. Binns, Attorney for United States of America.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD ON APPEAL—Filed November 14, 1950

It is hereby stipulated by and between the undersigned counsel for the Petitioner-Appellant and the Respondent herein that the following papers shall constitute the record

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN AND HARRY CARLISLE, PETITIONERS,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED APRIL 28, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN AND HARRY CARLISLE, PETITIONERS,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 25, 1951.

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12491-BH

In the Matter of FRANK CARLSON, also known as SOLOMON SKOLNICK, Petitioner for Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 2, 1950

Comes now John W. Porter, as attorney for Frank Carlson, also known as Solomon Skolnick, and petitions this Honorable Court for a writ of habeas corpus directing the District Director of the Immigration and Naturalization Service at Los Angeles to produce the said Frank Carlson before this Court on a date and at a time to be set by this Court, and then and there to show cause, if any he has, why the said Frank Carlson should not be released from custody upon his bond; and in support thereof your petitioner alleges as follows:

I

That said Frank Carlson (hereinafter for convenience called petitioner) is, and at all times since October 21, 1950, has been, unlawfully imprisoned, detained and restrained of his liberty by H. R. Landon, District Director of the Immigration and Naturalization Service, as the agent of the Attorney General of the United States; that petitioner is presently confined and detained by said District Director [fol. 3] without bond at Terminal Island, California, and that such imprisonment, detention, confinement and restraint are illegal, arbitrary and without authority in law, as hereinafter alleged.

II

On or about October 28, 1947, the Attorney General of the United States caused to be issued, and on or about November 3, 1947, to be served upon petitioner, a warrant for his arrest, charging in substance that petitioner was an alien found to be in the United States in violation of the immigration laws thereof, in that he was after entry an alien

who is a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow by force or violence of the Government of the United States, in violation of the Act of October 16, 1918.

III

That said warrant on its face authorized the release of petitioner under bond in the sum of $1,000.00, and that following his said arrest under said warrant petitioner was released upon posting bond in such amount; that at all times since on or about November 3, 1947, up to and including October 20, 1950, petitioner was at liberty under such bond.

IV

That on June 13, 14, 15, 16, 22, 23, 24 and 27, 1949, petitioner was duly ordered by the District Director of the Immigration and Naturalization Service for the San Francisco District to appear at hearings upon said warrant of arrest [fol. 4] for deportation, and that upon each of said dates petitioner did in fact appear for such hearings, which were held on said dates before a Presiding Inspector of the Immigration and Naturalization Service.

V

That thereafter, and in or about the month of February, 1950, the said hearings and deportation proceedings against petitioner were in substance and effect held to be void by the decision of the United States Supreme Court in the case of *Sung v. McGrath* (339 U. S. 33), and by virtue thereof new hearings under said warrant of arrest were required. That prior to the institution of such new proceedings the deportation case again petitioner was at his request transferred from the San Francisco to the Los Angeles District of the Immigration and Naturalization Service, and that said case at all times since January 1, 1950, has been, and now is, pending in the Los Angeles District of the Service.

VI

That on May 15, 1950, the District Director of the Los Angeles District of the Immigration and Naturalization Service by mail served upon petitioner and upon petitioner and his counsel, notice of a hearing under said warrant of

arrest, to be conducted before a Hearing Examiner of said Service on July 25, 1950. That on July 5, 1950, said District Director *by mail upon* petitioner and his counsel, notice of hearings upon said warrant of arrest to be held at Los [fol. 5] Angeles on September 7 and 8, 1950. That pursuant to said last mentioned notice said petitioner duly appeared at the Los Angeles offices of the Immigration and Naturalization Service on September 7, 1950; that on said date such hearing was commenced; that following the examination of two witnesses said hearing, at the request of the Government, was continued to a date to be set thereafter.

VII

That at all times from September 7, 1950, to date, petitioner has been available, ready and willing to appear and attend at such hearing or at any other lawful proceeding under said warrant of arrest, and is now so available.

VIII

That petitioner was born in Poland in 1913 and entered the United States in 1920 at the age of six years. That at all times since his said entry into the United States petitioner has been, and now is, a resident of the United States and has made and maintained his home here. That prior to the commencement of said deportation proceedings petitioner filed notice of intention to apply for United States citizenship and that such naturalization proceeding was interrupted by the initiation of deportation proceedings against him, as aforesaid.

IX

That continuously for fifteen years last past petitioner has been a resident of the State of California and that since the last part of 1949 he has at all times been, and now is, [fol. 6] a resident of the City of Los Angeles.

X

That said Frank Carlson is married to a native-born citizen and is the father of two children, presently aged seven and two years, both of whom were born in the State of California.

XI

That on Saturday, October 21, 1950, at approximately midnight, petitioner was arrested by agents of the District Director of the Immigration and Naturalization Service at Los Angeles, taken into custody and lodged in the County Jail of Los Angeles County. That at the time of such arrest petitioner was informed by said agents that the bond of $1,000.00 under which he had been at liberty since November 3, 1947, had been revoked.

XII

That on October 24, 1950, petitioner by his attorney filed in this Court a petition for writ of habeas corpus, alleging all of the foregoing facts. That pursuant to said petition this Court on said date issued its order to show cause, directing said H. R. Landon, as District Director of the Immigration and Naturalization — to appear before this Court on October 30, 1950, and then and there to show cause, if any he might have, why petitioner should not be released from custody upon his bond.

[fol. 7]

XIII

That on October 30 and 31, 1950, hearings were had before the Honorable Ben Harrison, Judge of this Court. That at the conclusion of such hearing on October 31, 1950, and while petitioner remained in custody, said District Director caused to be served upon petitioner a warrant of arrest dated October 31, 1950, alleging in substance that petitioner has been found in the United States in violation of the immigration laws and is subject to deportation thereunder in that he has been after entry an alien who was a member of the Communist Party of the United States, in violation of Section 1(2)(C) of the Act of October 16, 1918, as amended. That said warrant further recited, "Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 20th day of October, 1947".

XIV

That by virtue of the issuance and service of said warrant on October 31, 1950, the petition for a writ of habeas corpus filed on behalf of petitioner October 24, 1950, as aforesaid, became, and was, moot. That by virtue of the fact that said

petition had become moot petitioner on November 1, 1950, moved the Court to dismiss the said petition without prejudice, and said motion was thereupon granted.

XV

Petitioner is informed and believes and on the basis of such information and belief alleges that it is the intention [fol. 8] of said H. R. Landon, District Director of the Immigration and Naturalization Service, to hold petitioner in custody without bail indefinitely and until the final determination of his deportability.

XVI

That in causing the arrest and detention of petitioner upon and under the warrant of arrest issued October 28, 1947, and served November 3, 1947, said District Director acted without authority in law, and the arrest and detention thereunder were false, illegal and void.

XVII

That in causing the arrest and detention of petitioner upon and under said warrant dated October 28, 1947, and in causing the arrest of petitioner upon and under said warrant issued October 31, 1950, and in detaining petitioner thereunder without bail, said District Director has acted, and is acting, as the agent and representative of the Attorney General of the United States. That such arrest and detention under the circumstances hereinabove set forth have at all times constituted, and now constitute, an abuse of the discretion vested in the Attorney General of the United States by section 20 of the Immigration Act of February 5, 1917, as amended (57 Stat. 553), in the following, among other, respects:

(a) That no facts or circumstances exist or can be shown to justify revocation of a bond under which petitioner has heretofore been at liberty, as hereinbefore [fol. 9] alleged;

(b) That no facts or circumstances exist or can be shown to justify detention of petitioner indefin-tely or at all, without bond;

(c) That petitioner at all times herein mentioned has been, now is, and will continue to be, available to ap-

pear and will appear at any and all hearings or other lawful proceedings in connection with the determination of his deportability;

(d) That petitioner at all times herein mentioned has been, and now is, a law-abiding resident of the State of California, and since 1949 of the City of Los Angeles, with his home and family in the City of Los Angeles and with all of his interests and activities centered in and around the City of Los Angeles;

(e) That by virtue of the grant by the Supreme Court of the United States on October 23, 1950 of a petition for Writ of Certiorari in the case of *United States* v. *Dennis, et al.* for the express purpose of reviewing the constitutionality of the Statute known as the Smith Act of 1940 (54 Stat. 670, 671), the deportability of petitioner under said Act is placed in serious doubt and the validity of the charges against him as alleged above is placed in question.

XVIII

That the action of the said District Director in arresting [fol. 10] and detaining petitioner as aforesaid at all times constituted, and now constitutes, a denial of due process of law to petitioner in the following, among other, respects:

(a) That said petitioner was arrested as aforesaid on October 21, 1950, without warrant and without authority in law;

(b) That said District Director revoked the bond under which petitioner has been at liberty as aforesaid without notice to petitioner or his counsel, and without hearing;

(c) That such bond was revoked without claim or showing by said District Director of any facts, circumstances or conditions warranting any change in the terms upon which petitioner was, and has been, at liberty upon his bond;

(d) That by such arrest and detention petitioner has been deprived without due process of law of the opportunity to earn his living and to support himself and those dependent upon him;

(e) That the deportation proceedings against petitioner are in their initial stages and are likely to con-

tinue for many months, and that his detention without bail throughout such proceedings will deprive him of his liberty arbitrarily and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

[fol. 11]

XIX

That the detention of petitioner without bond as aforesaid constitutes a denial of bail in violation of the Eighth Amendment to the Constitution of the United States, and under the circumstances hereinbefore alleged further constitutes cruel and unusual punishment, in violation of said Eighth Amendment.

XX

That section 20 of the Immigration Act of February 5, 1917, as amended by section 23 of Public Law 831, 81st Congress (commonly known as Subversive Activities Control Act of 1950) and section 1 of the Act of October 16, 1918 (8 U.S.C. 137), as amended, are, and each of them is, unconstitutional and void in that they deprive persons, including petitioner, of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States in that they abridge the freedom of persons, including petitioner, of speech, the press and assembly and the right to petition the government for redress of grievances, in violation of the First Amendment to the Constitution of the United States, and in that they purport to authorize indefinite detention of persons, including petitioner, without bond prior to final determination of deportability.

XXI

That this petition is made and verified by John W. Porter as attorney for petitioner, and not by petitioner as the [fol. 12] person in custody, for the reason that petitioner is confined and restrained of his liberty at Terminal Island, California, that petitioner is not permitted to see anyone, including counsel, after 5:00 P.M. of any day, and that it is not practicable for the undersigned to travel to Terminal Island and visit petitioner for the purpose of securing his verification during the hours when petitioner may be visited; and for the further reason that the undersigned has personal knowledge of many of the facts and circumstances hereinabove alleged.

XXII

That no previous application for a writ of habeas corpus has been made in this matter to any other court, but that previous application was made to this Court as hereinabove alleged in paragraph XIV.

XXIII

That notice of the presentation of this application has been served upon said District Director and upon the United States Attorney.

Wherefore, said petitioner prays that a Writ of Habeas Corpus may be granted directed to H. R. Landon, District Director, Immigration and Naturalization Service, and to any Sheriff; Marshal, Constable, or other peace officer having custody of the body of petitioner, commanding him to have the body of petitioner before this Court at a time and place to be specified, to do and receive what shall then and there be considered concerning petitioner, together with the time and cause of his detention, and said Writ; that peti-
[fol. 13] tioner shall not be transferred nor removed pending said return from or out of the jurisdiction of this Court; and that pending hearing hereupon petitioner may be restored to his liberty upon reasonable bond.

Dated this 2nd day of November, 1950.

(S.) John W. Porter.

Duly sworn to by John W. Porter. Jurat omitted in printing.

Received copy of the within Notice of Presentation of Petition for Writ of Habeas Corpus and Petition for Writ
[fol. 14] of Habeas Corpus this 2nd day of November, 1950.

Ernest A. Tolin, U. S. Attorney, By Walter S. Binns.

Received copy of the within Notice of Presentation of Petition for Writ of Habeas Corpus and Petition for Writ of Habeas Corpus this 2nd day of November 1950.

H. R. Landon, District Director, Immigration and Naturalization Service, By H. R. Landon.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—November 3, 1950

Upon reading the verified petition of John W. Porter, petitioner, on file herein,

It is hereby ordered that H. R. Landon, District Director of the Immigration and Naturalization for the Los Angeles District, appear before the above entitled Court in the Courtroom of the Honorable Ben Harrison, at the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, on the 6 day of November, 1950, at 2 P.M. of said day, then and there to show cause, if any he may have, why he should not release from his custody, or the custody of such officers or agents of the Los Angeles District of the Immigration and Naturalization Service as may have custody of the same, upon bond in a reasonable sum, the body of Frank Carlson, also known as Solomon Skolnick.

Good cause being shown therefore, it is hereby ordered that this Order and the said Petition may be served upon said District Director on or before November 3, 1950, at 5:00 P.M. of said day.

Dated this 3rd day of November, 1950.

(S.) Ben Harrison, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS—Filed November 6, 1950

Petitioner, Frank Carlson, by his counsel, with leave of court, hereby amends his petition for writ of habeas corpus on file herein by adding thereto the following paragraph to be designated paragraph XVIII A:

XVIII A

Petitioner is informed and believes and on the basis of such information and belief alleges that in directing that petitioner be held without bond, as aforesaid, the Attorney

on appeal to the United States Court of Appeals for the Ninth Circuit herein:

1. The Petition for Writ of Habeas Corpus;
2. The Amendment to Petition for Writ of Habeas Corpus;
3. The Order to Show Cause Why Habeas Corpus Should Not Issue;
4. The respondent's Return to Order to Show Cause Why Writ Should Not be Granted;
5. The petitioner's Motion to Strike Portions of Return to Order to Show Cause;
6. The petitioner's Answer to Return to Order to Show Cause Why Writ Should Not be Granted;
7. Stipulation for Submission of Action;
8. Order Discharging Writ of Habeas Corpus, dated November 13, 1950;
9. Memorandum Opinion of Honorable Ben Harrison, United States District Judge, dated November 10, 1950;
10. Minute Order Discharging Writ and Minute Order denying petitioner-appellant's application for bail pending appeal, entered November 10, 1950;

[fol. 44] 11. Reporter's Transcript of Hearing on November 7, 1950, or such portions thereof as may be designated;

12. Notice of Appeal dated November 10, 1950.

Dated this — day of November, 1950.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner-Appellant. Ernest A. Tolin, United States Attorney, (S.) Walter S. Binns, Chief Assistant United States Attorney.

[File endorsement omitted.]

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

Edmund L. Smith, Clerk, by —— ——, Chief Deputy.

[fol. 45a] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12742

FRANK CARLSON, Also Known as Solomon Skolnick, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

Appeal from the United States District Court for the Southern District of California, Central Division

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

(Upon Appeal from Order of District Court of Nov. 13, 1951)

[fol. 45b] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER OF SUBMISSION—December 1, 1950

Ordered (1) motions for bail pending appeal (2) that causes be heard on typewritten transcript of record and typewritten briefs, and (3) cause on merits, argued by Mr. John W. Porter, counsel for appellant Carlson, and by Mrs. Rose S. Rosenberg, counsel for appellant Stevenson, and by Mr. John Caughlan, counsel for appellants Mangaoang and Sasieff, and by Messrs. Walter Binns and John E. Belcher, Assistants United States Attorney, and by Mr. John P. Boyd, Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for consideration and decision, counsel for respective parties to file further briefs in five days.

[fol. 45c] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—December 16, 1950

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 45d] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,742

FRANK CARLSON, Also Known as Solomon Skolnick, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

Appeal from the United States District Court for the Southern District of California, Central Division

OPINION—December 16, 1950

Before Stephens, Healy and Bone, Circuit Judges

STEPHENS, Circuit Judge:

Frank Carlson is being held in custody without bail, as a deportable alien, by Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice (called herein Director). He seeks his liberty on reasonable bail through the petition for the writ of habeas corpus by his attorney. Since Carlson is referred to in the record as the petitioner we shall follow that practice.

Petitioner was arrested and is being held under a warrant issued by Landon upon instruction of the Attorney

General of the United States, dated in October, 1950 (called herein the 1950 warrant); in which it is stated: "The Act of Oct. 16, 1918, as amended [by Internal Security Act of 1950 (ch. 1024, Pub. Law 831)] in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States," and in which it is [fol. 45e] provided: "Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 20th day of October, 1947." [called herein the 1947 warrant]

At the time of service of the 1950 warrant, petitioner was at liberty under bail which he had posted after his arrest under the 1947 warrant wherein he was charged with being a member of an organization which believes in and advocates violence to overthrow the Government of the United States (Im. Act of Oct. 16, 1918), and deportable. The bond mentioned was "revoked" soon after or before service of the 1950 warrant. Apparently the charge under the 1947 warrant has been abandoned, or, rather, it has been merged in the proceeding under the 1950 warrant.

The district court issued its order to show cause in the habeas corpus proceedings and the Director returned that he held petitioner upon the terms of the 1950 warrant and upon the allegation that there was "reasonable cause to believe" that petitioner's release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. Petitioner answered, alleging that the return was no sufficient justification and that the restraint without bail is without authority of law and that he has never been informed of any act which it is feared he may commit and that there is no cause for believing that he would commit any act of prejudice against the welfare of the United States and that he has repeatedly requested the Director to inform him as to what he has done or what it is feared he would do upon his release but that no answer has been forthcoming.

Petitioner further alleges that he was born in Poland in 1913 and entered this country at the age of 6 years, has lived in California for the last 15 years and prior to deportation proceedings had filed his application for citizenship; he is married and is the father of two California-born minor children; there is no basis for fearing that he will commit any act detrimental to the United States should he be freed on

bail; the deportation proceedings are liable to continue for many months; he will hold himself in readiness to appear at any and all sessions of hearings on the warrant and he has [fol. 45f] responded at all hearing sessions on the warrant of 1947 while at liberty under bail; the Internal Security Act of 1950 is unconstitutional as violative of the Fifth Amendment. Although the petitioner does not do so, Miriam Christine Stevenson in a companion case to which we allude in Note 4 contends that the United States' adherence to the United Nations has something to do with the issues of this case.

It is provided by the Internal Security Act of 1950, under which the 1950 warrant was issued, in Section 23 that: "Pending final determination * * *, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond. * * *" Correctly, as we hold, the court decided that this provision does not give the Attorney General or the Director absolute and final power to deny bail. Instead, the court held that the language quoted was but a clarification of language in Section 156, Title 8, U.S.C.A., of which it was amendatory, and left bail to the discretion of the Attorney General rather than to his unlimited power to deny it, and cited *United States ex rel. Zapp v. Dist. Dir.*, 2 Cir., 120 F. 2d 762 (1941), and *United States ex rel. Potash v. Dist. Dir.*, 2 Cir., 169 F. 2d 747 (1948).[1] These cases were decided under the section before the 1950 amendment and held that the Attorney General's discretion was not absolute but could be reviewed as to its reasonableness.

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[1] It is said in United States ex rel. Potash v. Dist. Dir., 2 Cir., 169 F. 2d 747 (1948), at p. 751: "The foregoing decisions and also, as it seems to us, the general spirit of our institutions make it improbable that Congress intended to give the Attorney General unlimited power over the admission to bail of aliens against whom deportation proceedings are brought. We think that it requires more than the general grant of power to fix bail in Section 156 to exempt the Attorney General from all control in the exercise of that function even if he should be shown to have acted in an arbitrary manner. This interpretation is particularly indicated in such a situation as the present where personal liberty is involved and there has been no determination that the alien is deportable."

We agree. And we add, the very fact that the Attorney General (or his assistants) has the power to grant bail before a deportation hearing or refuse it, carries with it the necessity of exercising discretion and certainly discretion must be based upon some phase of fact. It will be [fol. 45g] noticed that the Director's return contains a statement that there is "reasonable cause to believe" that petitioner's release would be prejudicial to the United States, a statement which connotes the exercise of discretion.

At the hearing the court invited petitioner to proceed to show facts relative to the issue of abuse of discretion but he declined to do so stating that he had alleged facts on the relevant issues which had not been denied. Thereupon the court dismissed the petition, holding that there had been no showing as to abuse of discretion. We think the court erred at this point.

It is well settled that there is no absolute right of an alien to be accorded bail after the service of a warrant for deportation and it is equally well settled that there is no absolute right of an alien to remain in this country. At the same time it is not claimed in this case, as the law now stands, that a legally admitted alien can be deprived of his liberty without good cause therefor as measured by the applicable law or that he can be deported without due process of law. Under statute and warrant of authorization, designated United States immigration officers may intercept individual aliens and subject them to hearings for the purpose of determining whether they are deportable and restrain them of their liberties for enforced deportation after hearing, but detention for long and unreasonable periods before hearing is illegal. There is an admirable collection of authorities upon most if not all of these fundamental points in *Skeffington, Im. Comm'r v. Katzeff, et al.*, 1 Cir., 277 F. 129 (1922). With these generalizations in mind, we turn to the specific law under which petitioner is being held. But first as to the inducing causes for the enactment of the Security Act of 1950.

From the beginning of their civilized history, the American continents have been viewed by oppressed peoples as the lands of freedom and opportunity. Notwithstanding occasional acts of oppression and the now happily abolished practice of human ownership, the governments established

[fol. 45h] in the New World have provided freedom and opportunity to the individual. It is fixed in the Constitution of the United States that individual right to liberty under due process of law is the prime end and concern of established governments. But charters are not self-executing and the old spiritually awakening cry of "Eternal Vigilance is the Price of Liberty" is never an outworn cliche.

The vision of freedom and opportunity has beckoned to our shores many law-abiding level-headed people eager to understand and practice our way of living while others have come full-charged with misconceived notions of their own unsuited to the American scheme of government, often centered upon license with little restraint. Others have come with treacherous plans to replace our form of government with age-old tyrannical rule or with anarchistic disruption of law and order.

Only in the last few years, however, a powerful foreign government, one for whose liberation from a world-dictator-plan we only recently sacrificed our sons and our treasure, has sought by stealth and abandon of morals and gratitude, to obstruct, disrupt, and over-throw our government and erect upon its ruins a branch of its own dictator absolutism. The eternal war of dictator dominance over the rightful liberties of the individual has flared into a consuming flame imposing upon this generation the duty of smothering it to impotence by sacrifices we little realize. And this appalling duty must not be served by fighting to a victory which in itself will be a defeat for the principles we fought for.

With these unpleasant truths showing plainly above the sea of unrealistic altruism, Congress put up the bars to immigration and provided rules for expulsion of the destructionists from our country. In the early part of 1950 Congress gave especial attention to the growing, dangerous fact that aliens in our midst were conspiring with naturalized and native-born citizens in prostituting the American political party system by affecting to act within it through a so-called Communist Party of the United States. It enacted the Internal Security Act of 1950 (Ch. 1024, Pub. Law 831 [H.R. 9490]) in which it is stated:

> [fol. 45i] "Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that

"(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

"(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

"(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

"(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

"* * *"

Following these statements of proven facts the Act sets out the methods followed and practiced by the destructionists. All of these should be carefully read and pondered by the so-called well-intentioned intellectuals, fellow-travelers and parlor-Communists. Then follows the statement im- [fol. 45j] mediately striking the instant case:

"(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

"(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

"(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when * * * overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. * * *."

There is more which we need not quote.

Out of this moving factual appraisal of an outstanding conspiracy of aliens and a few mentally intoxicated or drugged citizens and a sprinkling of the vicious, directed by a foreign government, came the authority of Congress to the Attorney General of the United States in his capacity as official head of immigration and naturalization activities to deport aliens who, any time since their entry, have been members of the Communist Party of the United States.[3]

We pass as wholly unmeritorious the contention that the Act is unconstitutional as to the issues here. And the startling contention by a petitioner in a companion case[3a] that the United Nations has taken over in the field of immigration and alien law need not divert us from the consideration [fol. 45k] of the United States as a sovereign state. We come to the central point of the case.

Habeas corpus, as we know, is civil in nature and the petitioner bears the burden of proving that his retention is illegal upon regular process being shown for the detention. We have already said we agree that it was the duty of the Attorney General or his assistant in the immigration service to admit petitioner to bail pending the habeas corpus proceedings unless he had good reason for refusing it, although

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[3] Since aliens have no franchise to vote but, as it appears, nevertheless may be members of the Communist Party, that organization is not solely a political party in the sense that we ordinarily use that term.

[3a] We mention this because we refer to this opinion in that case.

it is arguable from the facts upon which Congress acted that it meant to clothe the Attorney General with the unrestricted power to hold the alien without bail. So far as we are informed, the several United States district and appellate courts which have spoken on the subject have agreed that the Act cannot be so construed. The return to the Show Cause reveals the warrant as regular and its authenticity is not disputed. Petitioner declined to produce evidence but at this juncture of the case it will not do to say that he has failed entirely.

At the close of the hearing on the order to show cause, the parties stipulated and the judge acted under the stipulation that "* * * it is deemed that a writ of habeas corpus has been issued and that the hearing has been had upon a return to the writ. For said purpose the Return to the Order to Show Cause Why Petition for Writ of Habeas Corpus Should Not Be Granted and the Answer (sic) thereto are deemed the return and traverse to the writ. The determination upon this hearing shall be either that the writ is granted or that the writ is discharged."

There is, then, no denial of petitioner's allegations as to residence, family status, his attendance upon hearings under the 1947 warrant, and these allegations must be taken as true. See *In re Smith*, 143 Cal. 368, 77 Pac. 180 (1904); *Daly v. Elton*, 195 U.S. 242 (1904); *Whitten v. Tomlinson*, 160 U.S. 231 (1895), in which at p. 242 it is said: "In a petition for a writ of *habeas corpus*, verified by the oath of the petitioner, * * * facts duly alleged may be taken to be [fol. 451] true, unless denied by the return, or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous."

It would seem, therefore, that the return is insufficient when laid beside petitioner's undenied allegations for the reason that petitioner has gone about as far as he could go to prove his claim that his release will not prejudice the United States. If there is good reason for the action of the Director in denying bail it is locked in the Director's own chest of knowledge and is unrevealed for proof against it. Surely, in this circumstance, petitioner is not burdened by the impossible task of imagining and refuting causes which may have had a bearing upon the Director's discretion. Unless it is true that he is a bad risk, and the trial

court could not judicially conclude that he was merely upon the Director's say so. What more could petitioner have alleged in his answer or petition or could have attempted to prove at the hearing? A man's liberty is very different from a property right in an ordinary civil action and, although it is hornbook to say that habeas corpus is in nature a civil action, it remains that it deals in personal liberty as effectually as a criminal action. So far as our knowledge goes we know of no proceeding outside of the war powers which keeps a man imprisoned without a hearing as to the cause. See *United States v. Grayson*, 2 Cir., 166 F. 2d 863 (1948); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 560 (1946), aff. 2 Cir., 158 F. 2d 853 (1946). In 1 *Greenleaf on Evidence* 154 § 79 (16th ed. 1899) it is said: "* * * where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. * * *."

But the Director is wrong in assuming that petitioner is arguing to a point inconsistent with the principle that a petitioner in habeas corpus has the burden of showing that his detention is legally wrongful. In this phase of the case petitioner is not here questioning the sufficiency of the warrant or the return thereon as to its authenticity. He is not questioning the due process leading to the issuance of a warrant to a prison warden upon conviction and sentence after a court trial of facts, as is the case in a habeas corpus proceeding related to a criminal case. He is contesting the legality of his detention upon the ex parte finding of the Director and of the Director's order thereon [fol. 45m] which is a part of the Director's return. There is no return at all made upon this, the real issue here, except the criptic statement that the Director has information leading him to believe that petitioner's release would be harmful to the country. If the Director is given the power to use his discretion but that such discretion must not be abused, and the trial court so held and we agree, then the Director's return, to be good, must state some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing. Without this much, the return is insufficient unless it is supplemented by affidavits or with evidence at

the habeas corpus hearing, and this has not been done. In this situation the burden of the petitioner is not shifted to the Director and the Director is not required to "show his hand." All he must do is to assert fact, not conclusion, as the basis for his action. The truth of the Director's reasons for denying bail if at all reasonable is not triable by the district court in habeas corpus any more than the truth of allegations in a criminal charge is decided by a magistrate in a preliminary hearing. But whether there is factual reason back of the action must be shown in either proceeding. The imagination can hardly create a situation more incompatible with the spirit of our institutions than that one civil official's completely secret viewpoint could be the basis of sustained imprisonment.

If the Director's action was upon the theory argued in the briefs, but which was correctly rejected by the trial court, that there is no question of discretion in the case, that the Director, under instruction from the Attorney General, can hold or release the alien without revealing his reason for the choice, most of this opinion is surplusage. No doubt the uncertainty mentioned will be cleared up in the hearing which we order in the next paragraph.

The judgment is reversed and the cause is remanded with direction to the district court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such [fol. 45n] evidence and any other proper evidence which may be offered and received,[4] all in conformity with this opinion.

Reversed and remanded.

(Endorsed:) Opinion. Filed Dec. 16, 1950. Paul P. O'Brien, Clerk.

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[4] The record shows that the decision was had upon the hearing of the Show Cause order but it was stipulated that the judgment should be as though the writ issued.

There are three companion cases (appealed from the same court at Los Angeles), to the one specifically treated in the text of this opinion and the facts and issues are so

[fol. 450] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12742

FRANK CARLSON, etc., Appellant,

vs.

HERMAN R. LANDON, etc., Appellee

JUDGMENT—December 16, 1950

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed and this cause be, and hereby is remanded to the said District Court with directions to the said District Court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformith with the opinion of this court.

(Endorsed) Judgment. Filed and entered December 16, 1950. Paul P. O'Brien, Clerk.

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similar that little attempt to discuss the applicable law is made in our treatment of them. They are:

12743, Stevenson v. Landon;
12744, Hyun v. Landon; and
12745, Carlisle v. Landon.

There are two cases appealed from the District Court for the Western District of Washington which present like questions of law upon comparable but somewhat different facts. They are:

12757, Mangaoang v. Boyd; and
12758, Sasieff v. Boyd.

[fol. 46] **Supplemental Record**

IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS

The President of the United States of America to H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, Greeting:

You are hereby commanded, that the body of Frank Carlson, also known as Solomon Skolnick by you restrained of his liberty, as it is said detained by whatsoever names the said Frank Carlson, also known as Solomon Skolnick may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Ben Harrison, Judge of the United States District Court in and for the Southern District of California, at the courtroom of said Court, in the City of Los Angeles at 10:00 o'clock a.m., on the 5th day of January, 1951, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Ben Harrison, United States District Judge at Los Angeles, California, this 2nd day of January, A. D. 1951.

Edmund L. Smith, Clerk, by (S.) Murray E. Wire, Deputy Clerk. (Seal.)

United States Marshal's Return

So. District of Calif., ss:

Received the within writ the 3 day of Jan. 1951, and [fol. 47] executed same. Serving H. R. Landon by leaving Writ with Mr. H. A. Field, Room #651, Fed. Bldg., L.A.

James J. Boyle, U. S. Marshal, by (S.) Travis F. Oltman, Deputy Marshal.

Marshal's Fee $2.00.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

RETURN TO WRIT OF HABEAS CORPUS—Filed January 4, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to writ of habeas corpus granted in the above entitled case, respectfully state:

I

That Frank Carlson, also known as Solomon Sokolnick, hereafter referred to as the petitioner, is not being illegally restrained by respondent of his liberty, but is in respondent's custody under proper and lawful authority.

II

That the said petitioner is a native and national of Poland, born at Kosow, Galicia, Poland, on or about March 6, 1913.

III

That a warrant for the said petitioner's arrest was issued by authority of the Attorney General on October 28, 1947, charging that he was subject to deportation under the Act of October 16, 1918, as amended (8 USC 137), a certified copy of which warrant of arrest is attached hereto as a part of this return and marked Exhibit "A".

IV

That the said petitioner was taken into custody on the aforesaid warrant of arrest on November 3, 1947, and on [fol. 49] November 5, 1947, was released from custody on a delivery bond in the sum of $1,000.

V

That thereafter hearings were conducted on said warrant of arrest for the purpose of giving the petitioner an opportunity to show cause why he should not be deported, following the conclusion of which the record of hearing was forwarded to the Commissioner of Immigration and Naturalization, Washington, D. C., for decision.

VI

That the record in the case was on March 23, 1950, returned by the Acting Commissioner of Immigration and Naturalization, Washington, D. C., without decision, to the District Director of Immigration and Naturalization, Los Angeles, California, for a hearing de novo under the Administrative Procedure Act as a result of the decision of the Supreme Court in the case of *Sung v. McGrath*, 339 U.S. 33.

VII

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings on charges under the Act of October 16, 1918, as amended (8 USC 137).

[fol. 50]

VIII

That on October 6, 1950, the District Director of Immigration and Naturalization, Los Angeles, California, submitted to the Acting Commissioner of Immigration and Naturalization, Washington, D. C., a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all of whom were the subjects of pending deportation proceedings under the Act of October 16, 1918, as amended (8 USC 137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

IX

That on October 21, 1950, the following instructions were received by the District Director of Immigration and Naturalization, Los Angeles, California, by radio from the

Acting Commissioner of Immigration and Naturalization, Washington, D. C.:

> "Apprehend immediately and detain the following aliens pursuant to Section Twenty of Nineteen Seventeen Act as amended by Internal Security Act: David [fol. 51] Hyun and Harry Carlisle and Solomon Sokolnick. Also apprehend and detain all active Communists under proceedings in your district unless detention would result in severe hardship because of individual's physical condition or family situation. Give priority to those named".

X

That pursuant to the aforesaid instructions the petitioner was taken into custody on October 21, 1950, on the aforesaid warrant of arrest issued on October 28, 1947.

XI

That on October 27, 1950, the following radiogram was received by the District Director of Immigration and Naturalization, Los Angeles, California, from the Acting Commissioner of Immigration and Naturalization, at Washington, D. C.;

> "For your information and that of United States Attorneys and aliens and their attorneys the instruction to you of October twenty first to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued deten- [fol. 52] tion might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by section nine zero point one of title eight CFR paren twelve fr five zero seven two July thirty one Nineteen Forty Seven paren under section

thirty seven of the Alien Registration Act of Nineteen Forty comma eight USC four five eight".

XII

That on October 31, 1950, while the said petitioner continued in custody under the warrant of arrest issued on October 28, 1947, a new warrant of arrest was issued by authority of the Attorney General charging that he was subject to deportation under the act of October 16, 1918 (8 USC 137) as amended by the Internal Security Act of 1950, and served upon the said petitioner, which said warrant of arrest of October 31, 1950, superseded the said warrant of arrest issued on October 28, 1947; a copy of which said warrant of arrest of October 31, 1950, is attached hereto as a part of this return and marked Exhibit "C".

XIII

That pursuant to outstanding instructions from the [fol. 53] Acting Commissioner of Immigration and Naturalization, Washington, D. C., the case of petitioner, as other deportation cases under the Act of October 16, 1918, as amended (8 USC 137), has been given first priority in expediting hearing, to the end that the said case may be disposed of as speedily as possible, but delay has been encountered from counsel for the petitioner, as recited in more detail in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

XIV

That the Acting Commissioner of Immigration and Naturalization, Washington, D. C., acting for the Attorney General, has exercised the grant of statutory discretion in Section 20 of the Immigration Act of 1917 (8 USC 156), as amended by the Internal Security Act of 1950, to take the said petitioner into custody and to continue him in custody without bond pending final determination of his deportability, and in exercising said discretion to detain the said petitioner without bond the Acting Commissioner of Immigration and Naturalization, Washington, D. C., has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program

of the Communist Party, the central purpose of which is to subvert the existing Government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship com- [fol. 54] mitted to the destruction of individual liberty and private property; and that, moreover, said facts cause the said Acting Commissioner to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States—which findings the said Acting Commissioner has communicated to respondent on the basis of facts which the respondent has communicated to the said Acting Commissioner, tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party, as recited herein.

Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the writ of habeas corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service, United States Department of Justice, District No. 16.

[fol. 55] EXHIBIT "A" TO RETURN

Warrant for Arrest of Alien

United States of America, Department of Justice
Philadelphia, Pa.

No. A5 634 646, 245-P-76468

To: District Director of Immigration and Naturalization, San Francisco, California

Or to any Immigrant Inspector in the service of the United States

Whereas, from evidence submitted to me, it appears that the alien Salomon Sokolnick alias Solomon Skolnick or Sol Skolnick alias Frank Carlson who entered this country at New York, New York on the 23rd day of August 1920 has been found in the United States in violation of the immi-

gration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The Act of October 16, 1918, as amended, in that he is found to have been, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of and affiliated with an organization, association, society, and group that believes in, advises, advocates and teaches the overthrow, by force or violence, of the Government of the United States.

[fol. 56] I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1948." Authority has been granted to release under bond in the sum of ten hundred dollars, the alien named.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 28th day of October, 1947

(S.) A. R. Mackay, Chief, Exclusion and Expulsion Section. (Seal.)

[fol. 57] EXHIBIT "B" TO RETURN

IN THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Comes now Herman R. Landon, respondent herein, who states and deposes, as follows:

I. That he is District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said district.

II. That with respect to Solomon Szkolnick also known as Frank Carlson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has

been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that said petitioner has admitted membership in the Young Communist League, a Subsidiary, Branch, and Affiliate of the Communist Party of the United States; that petitioner was editor of the "Young Worker", official organ of the Young Communist League of the U.S.A.; that he was a member of the National Executive Committee of the Young Communist League; that he was the Secretary and President of the Young Communist League of California; that in 1945 he admitted membership in the Communist Party and stated that he believed in its program and [fol. 58] that he had been an active member thereof for fifteen years; that during the latter part of 1946 until about the summer of 1947, the petitioner was State Secretary of the Communist Party of the United States for the State of Wisconsin; that in 1949 petitioner caused to be published in "Our Times" (a weekend supplement of the "Daily People's World," West Coast organ of the Communist Party) an article entitled "I Demand Citizenship" in which he stated that he was a member of the Communist Party; that in September, 1949 he headed the Marxist Institute in Los Angeles; that he was present at a meeting of the Civil Rights Congress held in Los Angeles on September 4, 1950 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that in writing for the "Daily People's World" (official West Coast organ of the Communist Party of the U.S.A.), November 10, 1950 issue, he stated among other things in an article entitled "They can't Deport You" "I told them I am a Communist"; that said petitioner is well known as an educator and leader in the Communist Party; that in connection with his deportation hearings, the petitioner refused to answer questions concerning his membership in the Communist Party on the ground of self-incrimination.

III. That the Service records show with respect to petitioner's hearings under Service Warrant of Arrest (Government's Exhibit "C") that the case was first set for hearing on November 21, 1950 and continued to November 28, 1950 on motion of petitioner's counsel. On the latter [fol. 59] date, the hearing was again continued to December 14, 1950 on motion of petitioner's counsel. On the latter date, the case was again continued on motion of peti-

tioner's counsel to January 3, 1951. On the latter date on the motion of petitioner's counsel, it was again continued to February 16, 1951.

(S.) Herman R. Landon.

Subscribed and sworn to before me this 4th day of January, 1951. Edmund L. Smith, Clerk U. S. District Court, by Michael F. Leone, Deputy Clerk. (Seal.)

[fol. 60] EXHIBIT "C" TO RETURN

Warrant

For Arrest of Alien

United States of America, Department of Justice

Los Angeles, Calif.

No. A5 634 646, 245-P-76468

To District Enforcement Officer, Los Angeles, California, or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Salomon Sokolnick alias Solomon Skolnick or Sol Skolnick alias Frank Carlson who entered this country at New York, New York on the 23rd day of August 1920 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to [fol. 61] enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration

and Naturalization Service, 1951." Pending determination of deportability, the alien named is to be detained in custody. This warrant supersedes that issued on the 28th day of October, 1947.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director. (Seal.)

[fol. 62] IN THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Herman R. Landon, District Director, Immigration and Naturalization Service, Department of Justice, District No. 16, being first duly sworn, deposes and says:

That he is the person who makes the aforesaid return; that he has read the same and knows the contents thereof, and that the same is true according to the best of his knowledge and belief.

(S.) Herman R. Landon.

Subscribed and sworn to before me this 4th day of January, 1951. Edmund L. Smith, Clerk, U. S. District Court, By: (S.) Michael F. Leone, Deputy Clerk. (Seal.)

[fol. 63] ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged this 4th day of January, 1951, of a copy of the Return to Writ of Habeas Corpus, in the above-entitled and numbered case.

John W. Porter, Attorney for Petitioner, By (S.) John W. Porter, by (S.) Rose S. Rosenberg.

Endorsed: Filed Jan. 4, 1951. Edmund L. Smith, Clerk, By (S.) Wm. A. White, Deputy Clerk.

[fol. 64] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS—Filed January 5, 1951

Comes now, Frank Carlson, petitioner herein, and for his traverse to the return of Herman R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, respondent herein, admits, denies and alleges as follows:

I

Alleges that such return in whole, including the exhibits attached thereto, and particularly paragraphs VII, VIII, IX, XI, XII, XIII and XIV thereof, and each of them, fail to set forth facts sufficient to constitute a showing responsive to the writ herein or to show why petitioner should not be released from the custody of respondent upon his bond.

II

Alleges that paragraph XIII of said return, together with the exhibit therein referred to, fails to set forth any fact responsive to said writ and purports to allege facts which are irrelevant, immaterial and incompetent to show any cause for the detention of petitioner.

III

Refers to the allegations of his petition for writ of habeas corpus on file herein as set forth in paragraphs I to XX, inclusive, and by this reference incorporates each and all of the allegations thereof as if the same were fully set forth [fol. 65] in this traverse.

IV

Admits that hearings were conducted by respondent under the warrant of arrest, Exhibit C to the return, upon the dates listed in paragraph III of Exhibit B thereto and admits that motions for continuance were made by petitioner's counsel as therein stated; and in connection therewith alleges that hearings under said warrant have been held and conducted in accordance with the usual practice of the Immigration and Naturalization Service and subject only to such necessary delays and continuances as were necessarily required for preparation and by reason of con-

flicting engagements and obligations of counsel. Petitioner further alleges that proceedings for his deportation were initiated, as shown by the petition and the return herein, on November 3, 1947, by the service of a warrant of arrest for his deportation; that the first and only hearings under said warrant were, as alleged in paragraph IV of the petition, held in June, 1949; that following the transmission of the record of said hearings to the Commissioner in Washington and the return thereof on March 23, 1950, as alleged in paragraphs V and VI of the return, hearings *de novo* under said warrant were originally noticed by respondent for July 25, 1950 and by him were continued to September 7, 1950. Petitioner is informed and believes and on the basis of such information and belief alleges that in the normal course of deportation hearings, and through no [fol. 66] fault on the part of the alien, approximately one year customarily elapses between the commencement of hearings and the issuance of a final administrative decision, following administrative appeals, by the Board of Immigration Appeals, or, where appropriate, the Attorney General; that thereafter, under the Administrative Procedure Act the alien has the right to seek review by the United States courts of any order made against him, particularly with respect to questions of law and constitutionality, and that such process of review through the District Court, Court of Appeals and petition for writ of certiorari to the Supreme Court of the United States customarily takes upwards of two years.

V

Alleges that respondent's return, together with the exhibits thereto, is not responsive to and fails to comply with the mandate of the United States Court of Appeals for the Ninth Circuit herein, and that thereby continued custody and detention of petitioner is unlawful and a denial of due process of law and of other rights secured to him by the Constitution and laws of the United States.

Wherefore, petitioner prays that he be discharged from custody forthwith upon his bond.

Margolis and McTernan, by (S.) John W. Porter,
Attorneys for Petitioner.

January 5, 1951.

[fol. 67] *Duly sworn to by Frank Carlson. Jurat omitted in printing.*

Received copy of the within Traverse to Return this 5th day of January, 1951.

(S.) Walter S. Binns, Attorney for Respondent.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

AMENDED AFFIDAVIT—Filed January 8, 1951

(GOVERNMENT'S EXHIBIT "B")

In the United States of America, Southern District of California, Central Division

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Comes now Herman R. Landon, respondent herein, who states and deposes, as follows:

I. That he is District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said district.

II. That with respect to Solomon Szkolnick also known as Frank Carlson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been and still is a member of the Communist Party of the United States and has and is actively participating in the execution of its program for a world-wide revolution and the establishment of a Communist totalitarian dictatorship in the countries throughout the world; more specifically, that said petitioner has admitted membership in the Young Communist League, a Subsidiary, Branch, and Affiliate of the Communist Party of the United States; that petitioner is an admitted member of the Communist Party of the U. S. A. having joined it about 1932; that petitioner was

[fol. 69] editor of the "Young Worker", official organ of the Young Communist League of the U. S. A.; that he was a member of the National Executive Committee of the Young Communist League; that he was the Secretary and President of the Young Communist League of California; that in 1945 he admitted membership in the Communist Party and stated that he believed in its program and that he had been an active member thereof for fifteen years; that during the latter part of 1946 until about the summer of 1947, the petitioner was State Secretary of the Communist Party of the United States for the State of Wisconsin; that in 1949 petitioner caused to be published in "Our Times" (a week-end supplement of the "Daily People's World", West Coast organ of the Communist Party) an article entitled "I Demand Citizenship" in which he stated that he was a member of the Communist Party; that in September, 1949 he headed the Marxist Institute in Los Angeles; that on September 4, 1950 he was present at the meeting of the Civil Rights Congress in Los Angeles, California (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); that in writing for the "Daily People's World," (official West Coast organ of the Communist Party of the U. S. A.) November 10, 1950 issue, he stated among other things in an article entitled "They Can't Deport You," "I told them I am a Communist"; said issue of the "Daily People's World" is attached hereto and incorporated as part of this Exhibit; that said petitioner is presently [fol. 70] the Los Angeles County Educational Director for the Communist Party of the United States; that in connection with his deportation hearing at Los Angeles, California, on September 7, 1950 the petitioner refused to answer questions concerning his membership in the Communist Party on the grounds of self-incrimination.

III. That the Service records show with respect to petitioner's hearings under Service Warrant of Arrest (Government's Exhibit "C") that the case was first set for hearing on November 21, 1950 and continued to November 28, 1950 on motion of petitioner's counsel. On the latter date, the hearing was again continued to December 14, 1950 on motion of petitioner's counsel. On the latter date, the case was again continued on Motion of petitioner's counsel to January 3, 1951. On the latter date on the motion of peti-

tioner's counsel, it was again continued to February 16, 1951.

(S.) Herman R. Landon.

Subscribed and sworn to before me this 8th day of January, 1951. Edmund L. Smith, Clerk, U. S. District Court, by (S.) Ray E. Griffin, Deputy Clerk.

[File endorsement omitted.]

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Our Times

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Section

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READ

'THEY CAN'T DEPORT YOU'

Written from the Immigration Barracks in Los Angeles Harbor

BY RALPH IZARD

Agricultural students at Chi Heng state farm in Hopei province, where latest farm methods are demonstrated.

'I Saw the New China'

SAN FRANCISCO

MY FRIEND stood waiting impatiently for me at the gateway to New China. As I rode up to him from Portuguese Macao's frontier post, he seized my hand and exclaimed exultantly:

"Now we are in our own country—here we are free!"

Pride in freedom re-won after nearly 100 years of struggle, conscious of being at last masters in their own country and of their own destinies—these qualities shine almost visibly from the faces of nearly all the people one sees in New China.

You see it in the faces of the people in such recently liberated areas as Kwangtung, in China's extreme south. It is marked in the faces of the workers who throng the Wuhan cities on the western Yangtze. And it is most visible north of the Yellow river, the area liberated earliest, the vast region where land reform, reconstruction and increases in production have reached their highest levels.

In Peking, the powerhouse and GHQ of the Chinese revolution, this new pride, this heightening national consciousness are almost palpable forces. From Peking, too, one can see most clearly the swiftness with which China is changing.

Workers, peasants, political leaders of all parties, businessmen, factory owners and managers, engineers, regional administrators, educators, students, returning Overseas Chinese—all throng the city in an almost continuous stream, taxing its housing and food facilities. They come to Peking for the repeated meetings during which application of national policy to their particular functions is worked out in

(Editor's Note: Ralph Izard, a vet-

54B

BY FRANK CARLSON

'THEY CAN'T DEPORT YOU'

There were 25 men in the deportation barracks. Three were progressives just rounded up under terms of the new McCarran Act. One of the latter describes the conversation that ensued

Los Angeles victims of the McCarran Act roundup of foreign-born progressives. Above: David Hyun, shown with his son, David Jr. Right: The author.

"WHAT are ye in fur?"

The Scotsman turned his eyes toward me and waited. The room grew quiet. The postmeal half hour of cursing and swearing at the evening slop had run its course. Twenty-five men, using salty, descriptive phrases in half a dozen languages, had put the finishing touches to what passed for food at the Immigration Detention quarters at Terminal Island, in Los Angeles harbor.

Now they are searching for a new topic of conversation.

"What are ye in fur?" the Scotsman repeated.

"Politics," I answered.

"Politics? That's a nu us." His glance shifted to David Hyun and Harry Carlisle. They each nodded at me, too.

"Yur pullin m'shurt," he snorted.

"No, it's the truth."

"Cut it," came a gruff voice from one of the bunks. "Where are you from, Canada?"

"From nowhere. We live in the U.S. —right here in L. A."

"Then what'n ell ur yu doin' ere?" demanded the Scotsman.

"Well," I said, "while we are all Americans and have lived here practically all our lives, we never could get our citizenship papers. Harry, here, has been in the country since 1920. He was born in England. David was born in Korea; left there in 1936. I've been here for 30 years. I was born in Poland. This is our home. Our families are here. But the Immigration Department is trying to deport us."

The Scotsman wasn't satisfied.

"Why'n ell couldn't ya get yur papers?"

"Well, in my case," I explained, "because I'm a red."

"And they're trying to deport you for that?" asked a young Englishman wearing an army uniform.

I nodded.

From a corner of the room came a loud voice with a French accent, singing "My country 'tis of thee, sweet land of liberty—"

Another voice burst in with a shout, "The land of the free, and the home of the brave." A few more followed in similar vein.

The Scotsman looked at me sternly. [illegible]

rea he would still be in U.S. territory. David didn't think that was how things would end in Korea. "You don't know the Koreans," he answered.

main activity has been as a member of the Arts, Sciences & Professions Council of Southern California, for which I have lectured and delivered literary papers. I am a staff lecturer for the

waiting period and, instead of receiving my citizenship papers, was confronted with a pile of "evidence" proving that I was what I told them I was.

I recalled how the examining officer pressed me to the wall to answer whether I owned any real property, and then accusingly demanded, "Why don't you own any? Don't you believe in the private ownership of property?"

I explained what was happening in the country, the war mobilization, the McCarran Act, and the efforts that labor and progressive forces are mak-

(Here follow 2 Photolithographs, side folios 71, 72)

Note:

See last two exposures of this strip and above strip for side folios 71 and 72 (54A and 54B)

[fol. 73] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL RETURN TO WRIT OF HABEAS CORPUS—Filed January 9, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, herewith supplement my Return to Writ of Habeas Corpus in the above entitled matter, and in answer to petitioner's Traverse thereto filed deny and allege as follows:

I

In answer to paragraph III thereof, incorporating by reference the allegations of the petition to writ of habeas corpus heretofore filed, respondent has no information and belief as to paragraphs VIII, IX and X of said petition and therefore denies all of the allegations therein contained.

II

In answer to paragraph XVII of the petition, respondent denies that the decision to retain the respondent in custody without bail is an abuse of discretion on the part of the Attorney General of the United States; and respondent further alleges and has set forth in his Return facts and circumstances which justify the retention of respondent without bail. Respondent specifically denies that petitioner has been a law-abiding resident of the State of California and the City of Los Angeles and alleges that respondent has been a member of the Communist Party during his residence in the State of California and the City of Los Angeles, and [fol. 74] has, as such, participated in all of the illegal, subversive activities of such party.

III

In answer to paragraph XVIII of the petition, respondence denies that the pending deportation hearing will continue for many months and affirmatively alleges that such matters were set for trial immediately and would have been concluded by this time if it had not been for the refusal of petitioner to proceed to trial.

IV

Respondent denies that the deportation hearings in the Matter of Frank Carlson, also known as Solomon Skolnick, will continue for a period of one year or longer, and alleges that said hearings will proceed with due dispatch if respondent will consent to proceed to hearing instead of demanding continuous delays.

Wherefore, I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service United States Department of Justice District No. 16.

Dated: January 8, 1951.

[File endorsement omitted.]

[fol. 75] In United States District Court

Amended Supplemental Return to Writ of Habeas Corpus
Filed January 10, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, herewith supplement my Return to Writ of Habeas Corpus in the above entitled matter, and in answer to petitioner's Traverse thereto filed deny and allege as follows:

I

In answer to paragraph III thereof, incorporating by reference the allegations of the petition to writ of habeas corpus heretofore filed, respondent has no information and belief as to paragraphs VIII, IX and X of said petition and therefore denies all of the allegations therein contained.

II

In answer to paragraph XVII of the petition, respondent denies that the decision to retain the respondent in custody without bail is an abuse of discretion on the part of the Attorney General of the United States; and respondent

further alleges and has set forth in his Return facts and circumstances which justify the retention of respondent without bail. Respondent specifically denies that petitioner has been a law-abiding resident of the State of California and the City of Los Angeles and alleges that respondent has been a member of the Communist Party during his residence in the State of California and the City of Los Angeles and [fol. 76] has, as such, participated in all of the illegal, subversive activities of such Party.

III

In answer to paragraph XVIII of the petition, respondent denies that the pending deportation hearing will continue for many months and affirmatively alleges that such matters were set for trial immediately and would have been concluded by this time if it had not been for the refusal of petitioner to proceed to trial.

IV

In answer to paragraph 18(a) of Petitioner's Supplemental Petition, respondent denies all of the allegations therein contained.

V

Respondent denies that the deportation hearings In the Matter of Frank Carlson, also known as Solomon Skolnick, will continue for a period of one year or longer, and alleges that said hearings will proceed with due dispatch if respondent will consent to proceed to hearing instead of demanding continuous delays.

Wherefore, I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

(S.) Herman R. Landon, District Director Immigra-
[fol. 77] tion and Naturalization Service United States Department of Justice District No. 16.

Dated: January , 1951.

Subscribed and sworn to before me this 10th day of January, 1951. Edmund L. Smith, Clerk, U. S. District Court, by Ray E. Griffin, Deputy Clerk.

[File endorsement omitted.]

[fol. 78] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF TRIAL

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 11th day of January in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Ben Harrison, District Judge.

In re Frank Carlson, aka Solomon Skolnick, No. 12491-BH Civil.

In re Miriam Christine Stevenson, etc., No. 12492-BH Civil.

In re Harry Carlisle, aka Harry Carlyle, No. 12503-BH Civil.

In re David Hyun, No. 12505-BH Civil.

For further hearing on Return of Writ; John W. Porter, Esq., appearing as counsel for Frank Carlson, petitioner in case No. 12491-BH; Rose S. Rosenberg, Att'y, appearing as counsel for Miriam Christine Stevenson, petitioner in Case No. 12492-BH; Stanley Fleishman, Esq., appearing as counsel for Harry Carlisle, petitioner in case No. 12503-BH; Milton S. Tyre, Esq., appearing as counsel for David Hyun, petitioner in Case No. 12505-BH; Walter S. Binns, Ass't U. S. Att'y, appearing as counsel for respondent; all four said petitioners being present;

Court makes a statement relative to the delay of the hearings of the deportation proceedings pending before the Immigration Service. Attorney Porter makes a statement of objections on behalf of Petitioner Carlson to the taking herein of evidence relative to the deportation hearings. Attorneys Rosenberg, Fleishman, and Tyre, on behalf of the respective petitioners for whom they appear, state [fol. 79] that they join in the objections made on behalf of Petitioner Carlson.

The Court thereupon directs that the hearing officers be called to the stand, and thereupon

John B. Bartus and Roy Waddell, respectively, are called, sworn, and testify relative to the hearings in the deportation proceedings.

The Court makes a further statement and states that the burden now shifts to the aliens, petitioners herein, to establish by competent evidence the allegations of their petitions wherein it is stated that the action of the Attorney General in detaining them without bail is arbitrary and capricious. The Court states that it now offers an opportunity to each of the petitioners to take the stand in their own behalf.

Attorney Porter makes a statement that he submits the petition of Carlson on the present state of the record. The Court calls Petitioner Carlson to the stand, and his counsel objects thereto. Petitioner Carlson states that he desires to follow the advice of his counsel and not testify herein.

Attorney Rosenberg states that she takes the same position respecting the petitioner Stevenson, as counsel for petitioner Carlson. The Court inquires of Petitioner Stevenson if she desires to take the stand and the petitioner says that she takes the advice of her counsel not to testify.

[fol. 80] Attorney Fleishman for Petitioner Carlisle states that he takes the same position as counsel for Petitioner Carlson. The Court inquires of Petitioner Carlisle if he desires to take the stand, and Carlisle states that he desires to follow the advice of his counsel and not testify herein.

Attorney Tyre makes a statement of objections to respondent filing a supplemental return in the David Hyun matter, and moves that the said supplemental return be stricken. The Court denies said motion to strike said supplemental return.

At the request of Attorney Tyre, Court at hour of 2:40 PM recesses.

At 2:57 p.m. court reconvenes herein and all being present as before, including all four petitioners and counsel for both sides;

Attorney Tyre makes a statement to the Court that Petitioner Hyun does not desire to testify herein. In answer to the Court's question Petitioner Hyun states that on advice of his counsel he does not desire to testify herein.

Counsel for each of the petitioners states to the Court that the matter is submitted on the record in this proceeding.

The Court makes a statement of its decision in each of these matters, and directs counsel for the respondent in each case to prepare and present form of written order for signature, that the petition for Writ of Habeas Corpus is dismissed, and that the Writ of Habeas Corpus issued [fol. 81] herein is discharged.

Attorney Porter moves that the Court fix bail pending appeal in the Carlson case. The Court makes a statement that it will not grant bail pending appeal in any of these cases.

Attorney Fleishman makes a statement relative to the condition of the health of Petitioner Carlisle, and presents two affidavits, which are filed herein, and requests that bail be fixed pending appeal. Attorney Binns makes a statement and presents letter dated Jan. 8, 1951, from F. C. Stewart, Medical Director, Public Health Service, which is filed herein.

The Court makes a further statement relative to an examination of Petitioner Carlisle and report to the Court by an independent medical doctor. Attorney Fleishman states that he desires such an examination and report.

The Court states that it denies the motions for fixing of bail as to Petitioners Carlson, Stevenson and Hyun, but that as to Petitioner Carlisle the application for fixing of bail pending appeal will now be taken under submission, and directs counsel to confer relative to a doctor to make an examination of Petitioner Carlisle and report to the Court.

Attorney Rosenberg makes further statement to the Court on behalf of Petitioner Stevenson in support of release on bail pending appeal.

The Court and Attorneys Porter and Fleishman make further statements.

[fol. 82] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 22, 1951

The above matter having come on for hearing upon the writ of habeas corpus on the 9th day of January 1951, at 2:00 P.M., and on the 11th day of January 1951 at 2:00 P.M., before the Honorable Ben Harrison, Judge Presiding,

Margolis and McTernan by John W. Porter appearing as attorneys for petitioner, and Ernest A. Tolin, United States Attorney, by Walter S. Binns, Chief Assistant, appearing as attorneys for respondent Herman R. Landon, District Director of Immigration and Naturalization Service, and said respondent having filed his Return to the Writ of Habeas Corpus, and petitioner having filed his Traverse to said Return, and respondent having filed his Supplemental Return and an Amendment thereto, and the Court having heard oral argument and considered the Affidavit filed by respondent together with the Return, and having taken evidence as to the progress of the deportation hearings being considered before a hearing officer of the Immigration and Naturalization Service, and petitioner not desiring to submit evidence, the Court makes its findings of fact and conclusions of law.

Findings of Fact

I

That Frank Carlson, also known as Solomon Skolnick, is an alien and a native and national of Poland, born at Kosow, Galicia, Poland, on March 6, 1913.

[fol. 83]

II

That said petitioner was taken into custody on November 3, 1947, on a warrant of arrest issued by authority of the Attorney General on October 28, 1947, and was released from custody on a bond in the amount of $1,000.

III

That after a hearing on said warrant of arrest, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung v. McGrath*, 339 U. S. 33.

IV

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Natural-

[illegible] the city in an almost continuous stream, taxing its housing and food facilities. They come to Peking for the repeated meetings during which application of national policy to their particular functions is worked out in long discussions.

Indeed, the excuse heard most often for inability to keep personal appointments in China today is:

Very many meetings!"

All these meetings are aimed at the goal for the next two years that has been most clearly defined by Mao Tse-tung, chairman of the Central people's Government. With characteristic simplicity and penetration, Mao defined this goal in words understandable to all:

"We are struggling to increase production in order that within the next two years all the people of China may be well-fed and well-clothed."

WHILE pride in New China is limited to no one group or class, it is perhaps most apparent among two groups. The first of these are members of the People's Liberation Army, veterans all, who are deeply conscious of the role they played in winning China for the people. There's a popular saying in China that is in itself a tribute to the PLA and to the veterans of 17 to 22 years in age who comprise its ranks. The saying is:

"No Liberation Army, no New China."

Veterans of years of fighting to free China from the heritage of feudalism that imperialist power maintained for so long, rode with us on the completely restored railway from Canton to the Wuhan cities on the Yangtze, and from the other side of the Yangtze to Peking. There were soldiers of 20 who had fought for five years, and "aged" veterans of 24 who counted their service back into the anti-Japanese war.

Our train was itself a microcosm of New China. Aboard were businessmen and trade union leaders, students returning to China from years of study in the French university at Saigon, most of the staff of the former Kuomintang legation in Paris, Chinese who had lived overseas for years. Among the latter was a man of 84 who had lived for 70 years in the United States.

One felt the new pride in being Chinese among all of them, but most markedly among the veterans. All of these youngsters carried some sort of weapon, but not all these arms were stamped "Made in USA." Some soldiers carried Mauser pistols, others Japanese rifles. Most of their weapons, however, were U.S. made.

It was for this reason that Chiang Kai-shek was called "the quartermaster general," and his armies the quartermaster corps of the PLA. And few vehicles in government and army service today are other than U.S. made—trucks, motorcycles, jeeps, passenger cars, all are the familiar Detroit product, many of them late models. The jeep all-metal station wagon which took me from the Macao frontier to Chung San in Kwangtung province rolled off the assembly line in 1948.

PLA pride in the New China they have done so much to create is matched by the veterans' pride in their weapons and other equipment. Even with no inspection coming up, the PLA veteran's first care is his rifle or revolver. Vehicle drivers spend their idle time while on assignments taking care of their cars and trucks, tinkering with the engines, polishing the bodies, making minor adjustments.

MATCHING the pride of these PLA veterans in New China is that of the peasants who gave their sons to this superb army of the people. But the peasants now have an added reason for pride.

North of the Yellow river, peasants who were once sharecroppers, day laborers or sowing and harvest hands, now till their own soil. The effects of land reform on the national food supply of New China can be seen most clearly in the way threatened famine was dealt with during the past summer. Surplus stocks of grains were shipped to the threatened areas by rail, with an efficiency remarkable to old China residents.

That this was possible is testimony also to the success of the land reform program in the area it has been longest in effect—Northwest province (Manchuria). The 1948 total agricultural production was 18 million tons. This jumped to 18 million tons in 1949, after land reform. The Peking People's Daily has said of this great national undertaking:

"The nation-wide agrarian reform is greater in scope not only than anything known in Chinese history, but also than anything comparable in the history of world revolution."

Following the same course southward as was taken by the PLA in freeing China from the weight of 100 years of imperialist rule, frozen feudal relations and colonial status, land reform was scheduled for completion in all of China by 1953. The struggle to carry it through, said The People's Daily, "will be the fiercest struggle which the Chinese people have had to wage against the remnants of the feudal system since victory on the military fronts. Victory in this war will, in fact, put an end to the semi-feudal character of Chinese society."

BEFORE June 25 the vast and sweeping land reform program of New China had been scheduled for completion in the spring of 1953. But now, in the face of events in Korea, this program may be speeded up to the full extent possible within the farming seasons.

Earlier in June, Liu Shao-ch'i, vice chairman of the Central People's Government, delivered a long and important address on land reform before the second session of the People's Political Consultative Conference. The PPCC is the provisional national congress of New China.

Completion of the land reform program, Liu told PPCC delegates, would constitute "an extremely great historical victory for the Chinese people." It would abolish as a class China's landlords, who, south of the Yellow river, yet "possess approximately from 70 to 80 percent of the land and brutally exploit the peasants by means of this land."

The ultimate aim of the program, Liu said, is to transform "the land ownership system of feudal exploitation . . . into a system of peasant land ownership."

But events are moving so swiftly in New China that there has been a sharp divergence from the practices of even two years ago in the transformation of the Chinese land system. Two years ago, with the liberation war in full flood, Liu said, "the revolutionary war required that the peasants pay dearly (with fighters, public grain and labor duty) to support the war and strive for victory."

Under such harsh necessities, Liu said, "we allowed the peasants to requisition the surplus land and property of the rich peasants and also to confiscate all the property of the landlords."

Since the victory of the People's Liberation Army, however, "the two great tasks required of the peasants—military service and public labor—have come to an end . . . The great revolutionary unity of all nationalities, all democratic classes, parties and groups and people's organizations throughout the country has already been established politically and organizationally, and the political attitude of the rich peasants, in general, has also undergone a change."

At the present stage of the Chinese revolution, Liu said, the aim is to preserve the "rich peasant economy" of

(Continued on Page Seven)

(Editor's Note: Ralph Izard, a veteran journalist and long a close observer of events in Asia, has just returned to the United States from a trip to East Asia which included a three-month stay in New China. The accompanying article is the first in a series of on-the-scene reports, written especially for Our Times and The Daily People's World. The series will be continued in The Daily People's World of Monday, Nov. 12).

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land of liberty—"

Another voice burst in with a shout, "The land of the free, and the home of the brave." A few more followed in similar vein.

The Scotsman looked at me sternly. His new-born black beard bristled. Then, with the finality of a judge pronouncing sentence, he boomed:

"They can't do it to yu, lad. They'll never git away wit it."

The others voiced their agreement, in French, German, Spanish and "limey" English.

I agreed 100 percent. They can't get away with it!

Then it came pouring out. One after another the men gave vent to the "goodwill towards America" that the Marshall Plan, the Voice of America and Coca Cola have sown in Europe. What a harvest!

THE majority in the room were waiting impatiently to get deported. Seamen who had overstayed their time, a few illegal entries—all had had their fill of U.S. hospitality to foreigners. They wanted out. Several swore never to set foot on U.S. soil again.

Harry, David and I found ourselves on the defensive. "The country isn't as bad as all that." "Don't blame the people." "The man on the street does not want to swallow you up." "Americans want peace, too," etc., etc.

"Ya sound like a bunch of Yankees," came the reproach.

"We are," I answered.

The men wanted to know more about us. David started off.

He told them that he was a draftsman. He left Korea in 1926, lived in the Hawaiian Islands until 1947, when he came to California. He volunteered for the Army during World War II, but was not accepted since Korea was enemy territory. He did next best—air warden and civilian defense. While in Hawaii, he was president of his union local and continued his union activity here as a member of Local 9, United Office & Professional Workers.

Yes, he was married, to an American born citizen. They have two small children. He didn't like to see people pushed around and had become an active member of the Civil Rights Congress. Sure he liked the U.S.—he did not intend to leave.

Someone quipped that if sent to Korea he would still be in U.S. territory. David didn't think that was how things would end in Korea. "You don't know the Koreans," he answered.

A TALL statuesque Negro from the British West Indies was engaging Harry in conversation. Others in the room were listening, drawing closer.

"Of course I don't feel like an alien," Harry said. "Nor do I consider myself deportable. I came here from England more than 30 years ago. One builds a considerable life, develops family and other social relations, and absorbs much surrounding culture in three decades, so that if I were sent back to England, forcibly separated from relations embracing three generations of American citizens, I would for some time be more alien there than I am here.

"Why do they want to deport me? First, disregard the headlines about 'dangerous reds' and the manufactured aliases which imply sinister purposes. Such nonsense is deliberately calculated to fool the American people as to who we are and what we stand for.

"I have fought for the rights of labor, the maintenance of peace, and the creation of plenty for all mankind during most of my adult life. I learned the need for a new society, without war or economic crisis or colonial subjection of people, while working in English coal mines—long before there was a Bolshevik 'menace.' I am no conspirator. I am not undermining the Constitution. Those that put me here are doing that.

"What's that? They say I'm a writer and organizer for the Communist party?

"I suppose they refer to the fact that I have edited or contributed articles and stories to various labor and progressive publications, and I edited the works of Mike Quin, a well-loved columnist and feature writer for The Daily People's World, after he died of cancer in 1948.

● "But I have also worked on the docks, as a janitor, a sales manager, and have written for motion pictures as publicist and scenarist.

"As for organizer, I did organize writers' groups. In recent years my main activity has been as a member of the Arts, Sciences & Professions Council of Southern California, for which I have lectured and delivered literary papers. I am a staff lecturer for the Actors Laboratory Theater, as a specialist in the social background of dramatic literature.

"Obviously, I have been subject for many, many years to the same "charge" which, when stripped of the lies and blatant misrepresentation, I admit to with pride.

"I have fought for the rights of man, and threats of deportation are not going to halt that fight."

There was a pause.

"Yur quite a man, 'Arry," Scotty said approvingly.

THE men looked at me. It was my turn.

"Me? I'm the red menace," I told them. "I'm a Communist.

"When I was five Stalin got hold of me somewhere in Poland, put me through a one-year school for conspirators and shipped me over here to undermine the U.S. government. It took them 30 years here to catch up with me, but they finally caught me red-handed with a copy of The People's World in my possession and landed me. That's it."

The men grinned appreciatively and waited. They were intently serious. They wanted it straight.

I told them how more than 20 years ago, while still in high school, I had my first lesson in force and violence. I saw my brother beaten and bleeding as New York's finest smashed a picket line of striking furriers. That led me to look for an avenue to fight this force and violence. I found the answer in the Communist party.

I traced some of the struggles of the past 20 years and outlined the role that the Communist party played in them, and my small contribution to the fight. I told them of my activities as an organizer for the ILWU, my record during the war years, my efforts to secure citizenship.

I couldn't resist describing the scene at the Immigration Offices in San Francisco when I was called in at the end of the prescribed two-year

I explained what was happening in the country, the war mobilization, the McCarran Act, and the efforts that labor and progressive forces are making to stem the drive toward war and fascism. I gave assurance that repressive measures would not stop the U.S. working people—that the fight would go on and that I intended to continue to be part of it.

When I stopped for breath, a young Belgian, in broken English, told me:

"I hope you men can stay. We in Europe would feel safer if there were more Americans like you."

A fog horn sounded outside and the men ran to the windows. The conversation turned to ships. But it returned again and again to the "Yankees" who were going to be deported.

TWO NIGHTS ago, after a lengthy discussion, a unanimous vote was taken in our barracks to demand more bread with our meals. When the proposal was made that I write out the request to the officer in charge, a young Canadian seaman objected.

"Let's not put these fellows on the spot," he insisted. "I'll write it."

When one fellow remarked that in asking for bread we were voicing the cry of the whole world, a Hungarian muttered, "No, not the whole world."

Then, when the guard was handed the demand, he warned against any demonstration and threatened to send us all to the county jail. Then he shouted, "The reason you can't get more bread is because we're shipping it all to your countries in Europe."

An hour later he returned to inform us we'll get all the bread we want.

Last night the young Belgian (a jet pilot who had refused to re-enlist in the U.S. Air Force for fighting in Korea) wrote out the words of La Marseillaise in French and gave it to David, the Korean American, to paste up alongside his bunk.

"It's a little of the United Nations here, and it works," someone remarked.

"God bless ye, lads," the Scotsman said as we left for the court hearing. "God bless ye."

ization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings.

V

That on October 6, 1950, the respondent submitted to the Acting Commissioner a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens who were currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party.

[fol. 84]

VI

That on October 21, 1950, the respondent received a radiogram from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., directing him to apprehend and detain petitioner Frank Carlson, also known as Solomon Skolnick, among others. Therefore petitioner was re-arrested.

VII

That on October 31, 1950, a new warrant of arrest was issued by authority of the Attorney General charging that petitioner was subject to deportation as a person who had been, after entry into the United States, a member of the Communist Party. That pursuant to said instructions from the Attorney General, deportation hearings in petitioner's case were held on November 21, 1950, and continued to November 28, 1950; on the latter date the hearing was again continued to December 14, 1950; on the latter date the case was again continued to January 3, 1951; and on the latter date, it was again continued to February 15, 1951, all at the request of the petitioner's attorney.

VIII

That the Acting Commissioner of Immigration was in possession of evidence that said petitioner has been and still is a member of the Communist Party of the United States,

which evidence is set forth in the affidavit filed by respondent as follows:

"That with respect to Solomon Szkolnick also known [fol. 85] as Frank Carlson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been and still is a member of the Communist Party of the United States and has and is actively participating in the execution of its program for a world-wide revolution and the establishment of a Communist totalitarian dictatorship in the countries throughout the world; more specifically, that said petitioner has admitted membership in the Young Communist League, a subsidiary, Branch, and Affiliate of the Communist Party of the United States; that petitioner is an admitted member of the Communist Party of the U. S. A. having joined it about 1932; that petitioner was editor of the "Young Worker", official organ of the Young Communist League of the U. S. A.; that he was a member of the National Executive Committee of the Young Communist League; that he was the Secretary and President of the Young Communist League of California; that in 1945 he admitted membership in the Communist Party and stated that he believed in its program and that he had been an active member thereof for fifteen years; that during the latter part of 1946 until about the summer of 1947, the petitioner was State Secretary of the Communist Party of the United States for the State of Wisconsin; that in 1949 petitioner caused to be published in "Our Times" [fol. 86] (a weekend supplement of the "Daily People's World", West Coast organ of the Communist Party) an article entitled "I Demand Citizenship" in which he stated that he was a member of the Communist Party; that in September 1949 he headed the Marxist Institute in Los Angeles; that on September 4, 1950 he was present at the meeting of the Civil Rights Congress in Los Angeles, California, (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); that in writing for the "Daily People's World", (official West Coast organ of the Communist Party of the U. S. A.), November 10, 1950

issue, he stated among other things in an article entitled "They Can't Deport You," "I Told them I am a Communist"; said issue of the "Daily People's World" is attached hereto and incorporated as part of this Exhibit; that said petitioner is presently the Los Angeles County Educational Director for the Communist Party of the United States; that in connection with his deportation hearing at Los Angeles, California, on September 7, 1950 the petitioner refused to answer questions concerning his membership in the Communist Party on the grounds of self-incrimination."

IX

The Court takes judicial notice that a state of emergency exists and that an undeclared war is being waged in Korea [fol. 87] between the Armed Forces of the United States and the armed forces of Communist China.

CONCLUSIONS OF LAW

I

The Attorney General, through the Immigration and Naturalization Service, has exercised discretion in determining that petitioner Frank Carlson, also known as Solomon Skolnick, be retained in custody pending deportation.

II

The retention of Frank Carlson, also known as Solomon Skolnick, in custody pending deportation was not arbitrary or capricious.

III

There is substantial evidence to support the decision of the Attorney General, acting through the Immigration and Naturalization Service, to retain petitioner Frank Carlson, also known as Solomon Skolnick, in custody.

IV

Petitioner is not being illegally restrained by respondent but is in custody of respondent under proper and lawful order.

V

The Writ of Habeas Corpus is and should be discharged and dismissed.

(S.) Ben Harrison, United States District Judge.

Dated: January 22, 1951.

[fol 88] Approved as to form: Margolis and McTernan, by — ———, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 89] IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12491-BH

In the Matter of FRANK CARLSON Also Known as Solomon Skolnick, Petitioner for Writ of Habeas Corpus

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT—January 22, 1951

The mandate of the Circuit Court of Appeals for the Ninth Circuit was spread in the District Court on December 27, 1950. The Court thereupon, in accordance with the mandate, ordered the issuance of writ of Habeas Corpus directed to Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, and set January 5, 1951 as the return date on the said writ. On said date the Court set the matter for hearing on January 9, 1951, the petitioner being represented by his counsel Margolis and McTernan, by John W. Porter, and the respondent by his counsel Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns, Chief Assistant United States Attorney, and the Court having read the Return and the Traverse on file and the Supplemental Return, and having read and considered the Affidavit filed by respondent in addition to the Return and heard arguments, and further proceedings being had January 11, 1951, and the Court having taken evidence as to the progress of the

deportation hearing against Frank Carlson, also known [fol. 90] as Solomon Skolnick, before a hearing officer of the Immigration and Naturalization Service;

And the petitioner personally and by his attorney not desiring to submit evidence;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed and the Writ of Habeas Corpus issued herein be and hereby is discharged, and the petitioner is remanded to the custody of the Immigration and Naturalization Service of the Department of Justice.

Dated: January 22, 1951.

(S.) Ben Harrison, United States District Judge.

Approved as to form: Margolis and McTernan, by ——, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 22, 1951

Notice is hereby given that Frank Carlson, the petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order discharging the writ of habeas corpus and denying the petition for a writ of habeas corpus herein, made and entered in this action by the United States District Court, Honorable Ben Harrison, Judge presiding, on the 22nd day of January, 1951.

Dated this 22nd day of January 1951.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner.

(Affidavit of service by Mail.)

[File endorsement omitted.]

[fol. 92] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SUPPLEMENTAL RECORD ON APPEAL—Filed January 23, 1951

It is hereby stipulated by and between the undersigned counsel for the petitioner-appellant and for the respondent-appellee herein that the following documents and papers shall constitute the supplemental record on appeal to the United States Court of Appeals for the Ninth Circuit herein:

1. The Writ of Habeas Corpus issued herein on or about January 2, 1951.
2. The Return to Writ of Habeas Corpus of H. R. Landon, respondent herein, together with exhibits attached thereto, executed January 4, 1951.
3. The Traverse to Return to Writ of Habeas Corpus dated January 5, 1951.
4. The Supplemental Return to Writ of Habeas Corpus, together with Amended Affidavit of H. R. Landon attached thereto as Exhibit B.
5. The Amended Supplemental Return to Writ of Habeas Corpus.
6. Reporter's transcript.
7. Minute Order discharging writ and denying petition, entered January —, 1951.
8. Minute order denying application for bail pending appeal, entered January —, 1951.
9. Findings of Fact and Conclusions of Law entered [fol. 93] January 22, 1951.
10. Order discharging writ and denying petition, entered January 22, 1951.
11. Notice of Appeal dated January 22, 1951.
12. This stipulation.

Dated this 23rd day of January, 1951.

Margolis and McTernan, by (S.) John W. Porter, Attorneys for Petitioner-appellant. Ernest A. Tolin, United States Attorney, (S.) Walter S. Binns, Chief Assistant U. S. Attorney, Attorneys for Respondent-Appellee.

[File endorsement omitted.]

[fols. 94-98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12492-BH

In re MIRIAM CHRISTINE STEVENSON, Formerly Burroughs, nee Kenkel, Alias Miki Ashton

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 2, 1950

Comes now Rose S. Rosenberg, as attorney for Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, and petitions this Honorable Court for a writ of habeas corpus directing the District Director of the Immigration and Naturalization Service at Los Angeles to produce the said Miriam Christine Stevenson before this Court on a date and at a time to be set by this Court, and then and there to show cause why the said Miriam Christine Stevenson should not be released from custody upon her bond; and in support thereof petitioner alleges as follows:

I

On or about July 8, 1949, the Attorney General caused to be issued, and on or about July 26, 1949, to be served upon said Miriam Christine Stevenson, a warrant for her arrest, charging in substance that the said Miriam Christine Stevenson was an alien found to be in the United States in violation of the immigration laws thereof, in that at the time of her entry she was an immigrant not in possession of a valid immigration visa and not exempted from the [fol. 100] presentation thereof in violation of the Immigration Act of May 28, 1924; and that she was after entry an alien who is a member of an organization, society, or group that advises, advocates, or teaches the overthrow by force or violence of the government of the United States in violation of the Act of October 16, 1918 as amended; and that she is an alien who is a member of an organization, association, society or group that writes, circulates, distributes, prints, publishes, or displays any written or

printed matter advising, advocating or teaching the overthrow, by force or violence, of the government of the United States, in violation of the Act of October 16, 1918, as amended.

II

That said warrant on its face authorized the release of said Miriam Christine Stevenson under bond in the sum of Two Thousand Dollars ($2,000.00), and that following her said arrest under said warrant said Miriam Christine Stevenson was released upon posting bond in such amount.

III

That at all times since on or about July 26, 1949, said Miriam Christine Stevenson was at liberty under bond.

IV

That at all times when said Miriam Christine Stevenson was duly ordered by the District Director of the Immigration and Naturalization Service for the Los Angeles District to appear at hearings upon said warrant said Miriam Christine Stevenson did in fact appear for such hearings.

[fol. 101]

V

That thereafter, in or about the month of February, 1950, the said hearings and proceedings against said Miriam Christine Stevenson were in substance and effect held to be void by the decision of the United States Supreme Court in the case of *Sung* v. *McGrath* (339 U.S. 33), and by virtue thereof, new hearings under said warrant of arrest were required. That pursuant to the new regulations a hearing was scheduled for September 27, 1950, but by written notice from the District Director of the Immigration and Naturalization Service said case was taken off calendar until such time as said District Director should set a new date for said hearing; that since September 21, 1950, said Miriam Christine Stevenson and your petitioner as counsel have not been notified of said hearing nor of the date when such hearing would be resumed. That at all times from September 21, 1950, to date, said Miriam Christine Stevenson has been available, ready and willing to appear and attend at such hearing or at any other lawful proceeding under said warrant of arrest.

VI

That said Miriam Christine Stevenson was born in London, England in 1907; in 1919, at the age of twelve, said Miriam Christine Stevenson was taken by her family consisting of a stepfather, mother and sister to Canada where she resided with her family until 1923; that sometime in 1923, accompanying her mother, stepfather and sister, said Miriam Christine Stevenson entered into the United States at Noyes, Minnesota, a port of entry; that sometime in 1928 [fol. 102] Miriam Christine Stevenson moved to California and has at all times since been, and now is, a resident of the State of California and of the City of Los Angeles for approximately the past 24 years. That the sole occasions on which said Miriam Christine Stevenson has departed from the United States was in October, 1928, when said Miriam Chirstine Stevenson in the company of her mother, stepfather and sister crossed the border into Canada remaining there for a visit of several hours, reentering the United States on the same day at Blaine, Washington, a port of entry. That on or about December 23, 1928, for a period of approximately twenty-four hours, during which time said Miriam Christine Stevenson went to Tijuana, Mexico and there said Miriam Christine Stevenson was married to a citizen of the United States. That said Miriam Christine Stevenson reentered the United States on or about December 25, 1928, at Ysidro, California.

IX

That your petitioner is informed and believes and upon such information and belief alleges that sometime in 1929 said Miriam Christine Stevenson made inquiry of the Naturalization and Immigration Service regarding her status pursuant to filing a notice of intention to apply for United States citizenship and said Miriam Christine Stevenson did in fact fill in said form, but did not file same for the reason that said Miriam Christine Stevenson was informed that no [fol. 103] trace of a visa issued in the name of Miriam Kenkel, the maiden name of Miriam Christine Stevenson, could be found; that a visa in the name of her stepfather was found and a record of a head tax having been paid by him sometime in 1923, the date of entry, at Noyes, Minnesota, was on file; that, therefore, said notice of intention to apply for

United States citizenship by said Miriam Christine Stevenson could not be received. That said Miriam Christine Stevenson was until said notice of intention was refused, wholly unaware that her entry into the United States in 1923 was illegal, by reason of no proper visa having been issued to her. That said Miriam Christine Stevenson was unable, for purposes of establishing a legal entry into the United States, to leave the United States for a period of at least six months and thereafter to re-enter under a proper visa for the following reasons:

(1) She was unable to incur the financial burden such a plan would necessitate.

(2) She was by then already married to a citizen of the United States, and at the time hereinabove indicated, was pregnant with a child; that the risk involved to the husband of said Miriam Christine Stevenson of seeking and finding a job in another country, was too precarious;

(3) That the said Miriam Christine Stevenson was at the time in question financially aiding her mother and sister who had departed for Canada and were there residing for purposes of making a legal re-entry into the United States, [fol. 104] which legal entry into the United States both mother and sister of said Miriam Christine Stevenson did eventually effectuate; and to both of whom, after proper application for citizenship and hearings thereon, certificates of citizenship of the United States were in fact issued.

X

That said Miriam Christine Stevenson is now married to a native-born citizen, and is the mother of one child, age nineteen years, who was born in the United States.

XI

That on Tuesday, October 24, 1950, said Miriam Christine Stevenson was arrested by agents of the District Director of the Immigration and Naturalization Service at Los Angeles, taken into custody and lodged in the County Jail of Los Angeles County. That at the time of such arrest said Miriam Christine Stevenson was informed by said agents that the bond of Two Thousand Dollars ($2,000.00) under which she had been at liberty since July 26, 1949, had been revoked.

XII

That on October 26, 1950, petitioner on behalf of Miriam Christine Stevenson filed in this Court a petition for writ of habeas corpus, alleging all of the foregoing facts. That pursuant to said petition this Court on said date issued its Order to Show Cause, directing said H. R. Landon as District Director of the Immigration and Naturalization to appear before this Court on October 30, 1950, and then and [fol. 105] there to show cause, if any he might have, why said Miriam Christine Stevenson should not be released from custody upon her bond.

XIII

That on October 30 and 31, 1950, hearings were had before the Honorable Ben Harrison, Judge of this Court. That at the conclusion of such hearing on October 31, 1950, and while said Miriam Christine Stevenson remained in custody, said District Director caused to be served upon said Miriam Christine Stevenson a warrant of arrest dated October 31, 1950, alleging in substance that said Miriam Christine Stevenson has been found in the United States in violation of the immigration laws and is subject to deportation thereunder in that she has been after entry an alien who was a member of the Communist Party of the United States, in violation of section 1(2)(C) of the Act of October 16, 1918, as amended. That said warrant further recited, "Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 8th day of July, 1949."

XIV

That by virtue of the issuance and service of said warrant on October 31, 1950, the petition for a writ of habeas corpus filed on behalf of said Miriam Christine Stevenson October 26, 1950, as aforesaid, became, and was, moot. That by virtue of the fact that said petition had become moot, peti- [fol. 106] tioner on behalf of Miriam Christine Stevenson on November 1, 1950 moved the Court to dismiss the said petition without prejudice, and said motion was thereupon granted.

XV

Petitioner is informed and believes and on the basis of such information and belief alleges that it is the intention of said H. R. Landon, District Director of the Immigration and Naturalization Service, to hold said Miriam Christine Stevenson in custody without bail indefinitely and until the final determination of her deportability.

XVI

That in causing the arrest and detention of said Miriam Christine Stevenson upon and under the warrant of arrest issued July 8, 1949, and served July 26, 1949, said District Director acted without authority in law, and the arrest and detention thereunder were false, illegal and void.

XVII

That in causing the arrest and detention of said Miriam Christine Stevenson upon and under said warrant dated July 8, 1949, and in causing the arrest of said Miriam Christine Stevenson upon and under said warrant issued October 31, 1950, and in detaining said Miriam Christine Stevenson thereunder without bail, said District Director has acted, and is acting, as the agent and representative of the Attorney General of the United States. That such arrest and detention under the circumstances hereinabove set forth [fol. 107] have at all times constituted, and now constitute, an abuse of the discretion vested in the Attorney General of the United States by section 20 of the Immigration Act of February 5, 1917, as amended (57 Stat. 553), in the following, among other, respects:

(a) That no facts or circumstances exist or can be shown to justify revocation of a bond under which said Miriam Christine Stevenson has heretofore been at liberty, as hereinbefore alleged;

(b) That no facts or circumstances exist or can be shown to justify detention of said Miriam Christine Stevenson indefinitely, or at all, without bond;

(c) That said Miriam Christine Stevenson at all times herein mentioned has been, now is, and will continue to be, available to appear and will appear at any and all hearings or other lawful proceedings in connection with the determination of her deportability;

(d) That said Miriam Christine Stevenson at all times herein mentioned has been, and now is, a law-abiding resident of the State of California, and since 1926 of the City of Los Angeles, with her home and family in the City of Los Angeles, and with all of her interests and activities centered in and around the City of Los Angeles;

(e) That by virtue of the grant by the Supreme Court of the United States on October 23, 1950 of a [fol. 108] petition for Writ of Certiorari in the case of *United States* v. *Dennis, et al.*, for the express purpose of reviewing the constitutionality of the Statute known as the Smith Act of 1940 (54 Stat. 670, 671), the deportability of said Miriam Christine Stevenson under said Act is placed in serious doubt and the validity of the charges against her as alleged above is placed in question.

XVIII

That the action of the said District Director in arresting and detaining said Miriam Christine Stevenson as aforesaid at all times constituted, and now constitutes, a denial of due process of law to said Miriam Christine Stevenson in the following, among other, respects:

(a) That said Miriam Christine Stevenson was arrested as aforesaid on October 24, 1950 without warrant and without authority in law;

(b) That said District Director revoked the bond under which said Miriam Christine Stevenson has been at liberty as aforesaid without notice to said Miriam Christine Stevenson or her counsel, and without hearing;

(c) That such bond was revoked without claim or showing by said District Director of any facts, circumstances or conditions warranting any change in the terms upon which said Miriam Christine Stevenson was, or has been, at liberty upon her bond;

[fol. 109] (d) That by such arrest and detention said Miriam Christine Stevenson has been deprived without due process of law of the opportunity to earn her living and to support herself and those dependent upon her;

(e) That the deportation proceedings against said Miriam Christine Stevenson are in their initial stages

and are likely to continue for many months, and that her detention without bail throughout such proceedings will deprive her of her liberty arbitrarily and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

XIX

That the detention of said Miriam Christine Stevenson without bond as aforesaid constitutes a denial of bail in violation of the Eighth Amendment to the Constitution of the United States, and under the circumstances hereinbefore alleged further constitutes cruel and unusual punishment, in violation of said Eighth Amendment.

XX

That section 20 of the Immigration Act of February 5, 1917, as amended by section 23 of Public Law 831, 81st Congress (commonly known as Subversive Activities Control Act of 1950) and Section 1 of the Act of October 16, 1918 (8 U.S.C. 137), as amended, are, and each of them is, unconstitutional and void in that they deprive persons, including said Miriam Christine Stevenson, of liberty and property without due process of law, in violation of the [fol. 110] Fifth Amendment to the Constitution of the United States in that they abridge the freedom of persons, including said Miriam Christine Stevenson, of speech, the press and assembly and the right to petition the government for redress of grievances, in violation of the First Amendment to the Constitution of the United States, and in that they purport to authorize indefinite detention of persons, including said Miriam Christine Stevenson, without bond prior to final determination of deportability.

XXI

That this petition is made and verified by Rose S. Rosenberg as attorney for said Miriam Christine Stevenson, and not by said Miriam Christine Stevenson as the person in custody, for the reason that said Miriam Christine Stevenson is confined and restrained of her liberty at Terminal Island, California, that said Miriam Christine Stevenson is not permitted to see anyone, including her counsel, after 5:00 P.M. of any day, and that it is not practicable for the undersigned to travel to Terminal Island and visit said

Miriam Christine Stevenson for the purpose of securing her verification during the hours when said Miriam Christine Stevenson may be visited; and for the further reason that the undersigned has personal knowledge of many of the facts and circumstances hereinabove alleged.

XXII

That no previous application for a writ of habeas corpus [fol. 111] has been made in this matter to any other court, but that previous application was made to this Court as hereinabove alleged in paragraph XIV.

XXIII

That notice of the presentation of this application has been served upon said District Director and upon the United States Attorney.

Wherefore, said petitioner prays that a Writ of Habeas Corpus may be granted directed to H. R. Landon, District Director, Immigration and Naturalization Service, and to any Sheriff, Marshal, Constable, or other peace officer having custody of the body of Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, commanding him to have the body of said Miriam Christine Stevenson before this Court at the time and place to be specified, to do and receive what shall then and there be considered concerning said Miriam Christine Stevenson, together with the time and cause of her detention, and said Writ; that said Miriam Christine Stevenson shall not be transferred nor removed pending said return from or out of the jurisdiction of this Court; and that pending hearing hereupon said Miriam Christine Stevenson may be restored to her liberty upon reasonable bond.

Dated: this 2nd day of November, 1950.

(S.) Rose S. Rosenberg.

[fol. 112] *Duly sworn to by Rose S. Rosenberg. Jurat omitted in printing.*

Received copy of the within Notice of Presentation of Petition for Writ of Habeas Corpus and Petition for Writ of Habeas Corpus this 2nd day of November, 1950.

Ernest A. Tolin, U. S. Attorney, by Mary Wentworth.

[fol. 113] Received copy of the within Notice of Presentation of Petition for Writ of Habeas Corpus and Petition for Writ of Habeas Corpus this 2nd day of November 1950.

H. R. Landon, District Director, Immigration and Naturalization Service, by H. R. Landon.

[File endorsement omitted.]

[fol. 114] In United States District Court

Order to Show Cause—November 3, 1950

Upon the reading and filing of the petition of Rose S. Rosenberg, and good cause appearing therefor,

It is hereby ordered that H. R. Landon, District Director of the Immigration and Naturalization Service, show cause, if any he have, before me in the above entitled Court, at the United States Court House Building, 312 North Spring Street, Los Angeles, California, on the 6 day of November, 1950, at 2 o'clock P.M. of said day, why he should not release from his custody, or the custody of such officers or agents of the Los Angeles District of the Immigration and Naturalization Service as may have custody of the same, upon bond in a reasonable sum, the body of Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton.

It is further ordered that a copy of said Petition and a copy of this Order be served upon said District Director on November 3rd, 1950, before 5:00 P.M. of said day.

Dated: This 3rd day of November, 1950.

(S.) Ben Harrison, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 115] In United States District Court

Amendment to Petition for Writ of Habeas Corpus—Filed November 6, 1950

Petitioner, Miriam Christine Stevenson, by her counsel, with leave of the court, hereby amends her petition for

writ of habeas corpus on file herein by adding thereto the following paragraph to be designated Paragraph XVIII A:

XVIII A

Petitioner is informed and believes and on the basis of such information and belief alleges that in directing that petitioner be held without bond, as aforesaid, the Attorney General at all times herein mentioned has acted and continues to act solely upon the conslusion that there is reasonable cause to believe that if petitioner were enlarged on bail she would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States. Petitioner denies that there is reasonable or any cause for such conclusion or for such belief, denies that she has engaged at any time in any such activities or conduct, and specifically denies that she will engage in or plans, intends, contemplates, proposes or considers engaging in, if enlarged on her bond, any activities or conduct which would be prejudicial to the public interest or would endanger the welfare or safety of the United States. Petitioner has never been informed or advised by the Attorney General or by any agent or subordinate of the Attorney General of the facts, if any, upon which the Attorney General bases the conclusion that there is reason-
[fol. 116] able cause to believe petitioner, if enlarged, would engage in such activities; nor upon what past activities of petitioner, if any, the Attorney General relies for such conclusion; nor what activities the Attorney General anticipates would be engaged in by petitioner if she should be enlarged; nor in what respect such activities if engaged in are deemed by the Attorney General to be prejudicial to the public interest or to endanger the welfare and safety of the United States. Petitioner further alleges that repeatedly since her said arrest on October 24, 1950, she has requested such information of said District Director as agent of the Attorney General and that said District Director at all times since October 24, 1950, has failed and refused to furnish such information or any information whatever with respect to the reasons for petitioner's detention.

Dated: this 6th day of November, 1950.

(S.) Rose S. Rosenberg.

[File endorsement omitted.]

[fol. 117] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 6, 1950

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to order to show cause why writ of habeas corpus should not be granted in the above entitled case, respectfully state:

I

That Miriam Christine Stevenson, hereinafter referred to as the petitioner, is not being illegally restrained by me of her liberty, but is in my custody under proper and lawful authority.

II

That the said petitioner is in my custody pursuant to a warrant of arrest, dated October 31, 1950, issued by authority of the Attorney General, directing that the petitioner be taken into custody and granted a hearing to enable her to show cause why she should not be deported in conformity with law, a certified copy of which is attached hereto as a part of this return and marked Exhibit "A".

III

That there is reasonable cause to believe that if the said petitioner were enlarged on bail *he* would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United [fols. 118-119] States.

Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the said petition for issuance of a writ of habeas corpus in the case of the petitioner be denied.

(S.) Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Duly sworn to by Herman R. Landon. Jurat omitted in printing.

[fol. 120] UNITED STATES OF AMERICA, : DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

Los Angeles, California,
November 6, 1950.

CERTIFICATION

By virtue of the authority vested in me by 8 C. F. R. 383.7, a regulation issued by the Commissioner of Immigration and Naturalization with the approval of the Attorney General pursuant to 5 U. S. C. 22 and 311, and 8 U. S. C. 102, 222, 458 and 727.

I hereby certify that the annexed document, a Warrant of Arrest, is a true copy of the original thereof from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Miriam Christine Stevenson, File No. 1600-52326, of which the Attorney General is the legal custodian.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

(S.) Herman R. Landon, District Director, Immigration and Naturalization Service. (Seal.)

[fol. 121] EXHIBIT A TO RETURN

Warrant for Arrest of Alien, United States of America, Department of Justice

Los Angeles, Calif.

1600-52336

No. A-5822361

To District Enforcement Officer, Los Angeles, California.
Or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Miriam Christine Stevenson, formerly Burroughs nee Krenkel alias Miki Ashton who entered this country at San Ysidro, California on the 26th day of December, 1928

has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that she has been, after entry, a member of the following class set forth in Section 1(2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant her a hearing to enable her to show cause why she should not be deported in conformity with law. The expenses of detention, hereunder, [fol. 122] if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 8th day of July, 1949.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

Acknowledgment of Service

Receipt is hereby acknowledged his 6th day of November, 1950, of a copy of the Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted, in the above-entitled and numbered case.

Rose S. Rosenberg, Attorney for Petitioner, by (S.) Rose S. Rosenberg.

[File endorsement omitted.]

[fol. 123] In United States District Court

Motion to Strike Portions of Return to Order to Show Cause—Filed November 10, 1950

Miriam Christine Stevenson, Petitioner herein, hereby moves the above entitled Court to strike from the Return of Herman R. Landon to the order to show cause herein the

following portions thereof, upon the ground that the same are, and each of them is sham, irrelevant, not a factual response, and mere conclusion:

(1) All of paragraph I thereof.
(2) All of paragraph III thereof.

Said motion is based upon the petition of petitioner herein, the attached memorandum of points and authorities, and all the other records and files herein.

Dated: November 8, 1950.

(S.) Rose S. Rosenberg, Attorney for Petitioner.

Received copy of the within Motion to Strike Portions of Return this 9th day of Nov. 1950.

(S.) Walter S. Binns, Attorney for ——.

[File endorsement omitted.]

[fol. 124] IN UNITED STATES DISTRICT COURT

ANSWER TO RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 10, 1950

Comes now Miriam Christine Stevenson, petitioner herein, and for her answer to the Return of H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, respondent herein, admits, denies and alleges as follows:

I

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to constitute a return to the order to show cause herein.

II

Alleges that such Return in whole, and particularly paragraphs I and III thereof, fails to set forth facts sufficient to show any cause why the writ prayed for by the petitioner, on file herein, should not be granted, and fails to set forth any fact whatever responsive to said order to show cause.

III

Answering paragraphs I of said Return, denies that petitioner is not being illegally restrained of her liberty by respondent, and denies that petitioner is in the custody of respondent under proper and lawful authority.

[fol. 125]

IV

Answering paragraph II of said Return, admits that petitioner is in the custody of respondent under color of a warrant of arrest dated October 31, 1950, a certified copy of which warrant is attached to said Return and marked Exhibit A, and alleges that such custody is unlawful and an abuse of discretion on the part of respondent and of the Attorney General of the United States.

V

Answering Paragraph III of said Return, denies that there is reasonable or any cause to believe that if petitioner were enlarged on bail she would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States, and in connection therewith refers to and by this reference incorporates herein as if fully set forth each and all of the denials and allegations set forth in her amendment to the Petition for Writ of Habeas Corpus on file herein, designated paragraph XVIIIA thereof.

VI

Refers to the allegations of her Petition for Writ of Habeas Corpus on file herein, set forth in paragraphs I to XXIII inclusive, and by this reference incorporates each and all of the allegations thereof as if the same were fully set forth herein.

Wherefore, petitioner prays that a writ of habeas corpus [fol. 126] issue and that she be forthwith restored to her liberty upon reasonable bond.

(S.) Rose S. Rosenberg, Attorney for Petitioner.

Received copy of the within Answer to Return this 9th day of Nov. 1950.

(S.) Walter S. Binns, Attorney for —— ——.

[File endorsement omitted.]

[fol. 127] IN UNITED STATES DISTRICT COURT

STIPULATION FOR SUBMISSION OF ACTION—Filed November 10, 1950

It is hereby stipulated by and between the undersigned counsel for the petitioner and for the respondent herein that:

(1) The above entitled matter has been submitted to the Court upon a record consisting of:

(a) The Petition for Writ of Habeas Corpus, as amended with leave of the Court, by the Amendment to Petition for Writ of Habeas Corpus;

(b) The Order to Show Cause why writ of habeas corpus should not issue;

(c) The respondent's Return to the Order to Show Cause Why Writ Should Not be Granted;

(d) The petitioner's Motion to Strike Portions of Return to Order to Show Cause;

(e) The petitioner's Answer to Return to Order to Show Cause Why Writ Should Not Be Granted;

(f) This Stipulation.

(2) The Motion to Strike Portions of Return to Order to Show Cause has been denied.

(3) The petitioner waives oral testimony in support of the Petition and Answer and submits the matter upon the foregoing record and stipulation, without offering any oral testimony, notwithstanding that the Court has offered to receive such testimony.

[fol. 128] (4) For the purpose of this record it is deemed that a writ of habeas corpus has been issued and that a hearing has been had upon a return to the writ. For said purpose the Return to Order to Show Cause Why Petition For Writ of Habeas Corpus Should Not Be Granted and the Answer thereto are deemed the return and traverse to the writ. The determination upon this hearing shall be either that the writ is granted or that the writ is discharged.

Dated: November 9, 1950.

(S.) Rose S. Rosenberg; Ernest A. Tolin, United States Attorney, (S.) Walter S. Binns, Chief Assistant United States Attorney. Ray H. Kinnison,

Assistant United States Attorney, Chief of Criminal Division, Attorneys for Respondent, H. R. Landon, District Director.

[File endorsement omitted.]

[fols. 129-139] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL AND DISPOSITION OF CASE

At a stated term, towit: the September Term, A. D. 1950 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 10th day of November in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Ben Harrison, District Judge.

In re Frank Carlson, aka Solomon Skolnick, No. 12491-BH-Civil.

In re Miriam Christine Stevenson, etc. No. 12492-BH-Civil. In re Harry Carlisle, aka Harry Carlyle, No. 12503-BH-Civil.

In re David Hyun, No. 12505-BH-Civil.

(Same order in each case:) At 2 P. M. court convenes herein and each of the petitioners appearing by their counsel of record and Walter S. Binns, Ass't U. S. Att'y, appearing as counsel for respondent;

Written stipulation for submission of action is presented and filed.

The Court, at this time, states that an Opinion of the Court will later be filed, and orders the Writ discharged. Counsel for respondent is directed to prepare and present proposed order discharging the Writ, for signature.

Application is made on behalf of petitioner that the Court fix the amount of bail pending appeal, and the Court orders said application denied.

[fol. 140] IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12492-BH

In re MIRIAM CHRISTINE STEVENSON, Formerly Burroughs, nee Kenkel, Alias Miki Ashton

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT—November 13, 1950

The above-entitled matter came on regularly for hearing on an Order to Show Cause why a petition for writ of habeas corpus should not be granted on November 7, 1950 in the above entitled Court before the Honorable Ben Harrison; the petitioner being represented by *his* counsel, Rose S. Rosenberg, and the respondent by his counsel, Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns and Ray H. Kinnison, Assistant United States Attorneys; and the Court having read the petition and the return on file and heard arguments, and the parties by their attorneys having stipulated that a writ of habeas corpus be deemed to have issued and that the return on file be considered as the return to said writ; and the petition as amended be deemed a traverse by petitioner; and it being further stipulated that the petitioner did not desire to present evidence in support of the traverse;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed, and that [fol. 141] the writ of habeas corpus issued herein be and hereby is discharged.

Dated: November 13, 1950.

(S.) Ben Harrison, United States District Judge.

Approved as to form: (S.) Rose S. Rosenberg, by John W. Porter.

Judgment Entered Nov. 13, 1950, Book 69, Page 183. Edmund L. Smith, Clerk, by C. A. Simmons, Deputy.

[File endorsement omitted.]

[fol. 142] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—November 10, 1950

Notice is hereby given that Miriam Christine Stevenson, petitioner above named hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order discharging the writ of habeas corpus herein, made and entered in this action by the United States District Court, Honorable Ben Harrison, Judge Presiding, on the 10th day of November, 1950.

Dated this 10th day of November, 1950.

(S.) Rose S. Rosenberg.

[File endorsement omitted.]

[fol. 143] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD ON APPEAL—Filed November 15, 1950

It is hereby stipulated by and between the undersigned counsel for the Petitioner-Appellant and for the Respondent herein that the following papers shall constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit herein:

1. The Petition for Writ of Habeas Corpus;
2. The Amendment to Petition for Writ of Habeas Corpus;
3. The Order to Show Cause Why Habeas Corpus Should Not Issue;
4. The respondent's Return to Order to Show Cause Why Writ Should Not Be Granted;
5. The petitioner's Motion to Strike Portions of Return to Order to Show Cause;
6. The petitioner's Answer to Return to Order to Show Cause Why Writ Should Not Be Granted;
7. Stipulation for Submission of Action;
8. Order Discharging Writ of Habeas Corpus, dated November 10, 1950;
9. Memorandum Opinion of Honorable Ben Harrison, United States District Judge, dated November 10, 1950;

10. Minute Order Denying petitioner-appellant's application for bail, entered November 10, 1950;

11. Reporter's Transcript of hearing on November 7, 1950, or such portions thereof as may be designated.

[fol. 144] 12. Notice of Appeal dated November 10, 1950.

Dated: This 14 day of November, 1950.

(S.) Rose S. Rosenberg, Attorney for Petitioner-Appellant. Ernest A. Tolin, U. S. Attorney, by (S.) Walter S. Binns, Attorney for Respondent.

[File endorsement omitted.]

[fols. 145-147] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 148] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS—January 2, 1951

The President of the United States of America

To H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, Greeting:

You are hereby commanded, that the body of Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, by you restrained of *his* liberty, as it is said detained by whatsoever names the said Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, may be detained, together with the day and cause of her being taken and detained, you have before the Honorable Ben Harrison, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles at 10:00 o'clock a. m., on the 5th day of January, 1951, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Ben Harrison, United States District Judge at Los Angeles, California this 2nd day of January, A. D. 1951.

Edmund L. Smith, Clerk, by (S.) Murray E. Wire, Deputy Clerk. (Seal.)

[fol. 149] UNITED STATES MARSHAL'S RETURN

So. District of Calif., ss:

Received the within writ the 3 day of Jan. 1951, and executed same. Serving H. R. Landon by leaving writ with Mr. H. A. Field, Room #651, Fed. Blg. L. A.

James J. Boyle, U. S. Marshal, by (S.) Travis F. Oltman, Deputy Marshal

Marshal's Fee $2.00.

[File endorsement omitted.]

[fol. 150] IN UNITED STATES DISTRICT COURT

RETURN TO WRIT OF HABEAS CORPUS—Filed January 4, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to writ of habeas corpus in the above entitled case, respectfully state:

I

That Miriam Christine Stevenson, hereafter referred to as the petitioner, is not being illegally restrained by respondent of her liberty, but is in respondent's custody under proper and lawful authority.

II

That the said petitioner is a native and subject of Great Britain, born at London, England, on or about August 26, 1907.

III

That a warrant for the said petitioner's arrest was issued by authority of the Attorney General on July 8, 1949, charging that she was subject to deportation under the Act of October 16, 1918, as amended (8 U. S. C. 137), a certified copy of which warrant of arrest is attached hereto as a part of this return and marked Exhibit "A".

IV

That the said petitioner was taken into custody on the aforesaid warrant of arrest on July 26, 1949, and on the [fol. 151] same date was released from custody on a delivery bond in the sum of $2,000.

V

That, after a hearing on said warrant of arrest, to give said petitioner an opportunity to show cause why she should not be deported, a hearing de novo under the administrative procedure act was ordered as a result of the decision of the Supreme Court in the case of *Sung v. McGrath*, 339 U. S. 33.

VI

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings on charges under the Act of October 16, 1918, as amended (8 U. S. C. 137).

VII

That on October 6, 1950, the District Director of Immigration and Naturalization, Los Angeles, California, submitted to the Acting Commissioner of Immigration and Naturalization, Washington, D. C., a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist [fol. 152] Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all of whom were the subjects of pending deportation proceedings under

the Act of October 16, 1918, as amended (8 U. S. C. 137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

VIII

That on October 21, 1950, the following instructions were received by the District Director of Immigration and Naturalization, Los Angeles, California, by radio from the Acting Commissioner of Immigration and Naturalization, Washington, D. C.:

> "Apprehend Immediately and Detain the Following Aliens Pursuant to Section Twenty of Nineteen Seventeen Act as Amended by Internal Security Act: David Hyun and Harry Carlisle and Solomon Sokolnick. Also Apprehend and Detain All Active Communists Under Proceedings in Your District Unless Detention Would Result in Severe Hardship Because of Individual's Physical Condition or Family Situation. Give Priority to Those Named."

IX

That pursuant to the aforesaid instructions the petitioner [fol. 153] was taken into custody on October 24, 1950, on the aforesaid warrant of arrest issued on July 8, 1949.

X

That on October 27, 1950, the following radiogram was received by the District Director of Immigration and Naturalization, Los Angeles, California, from the Acting Commissioner of Immigration and Naturalization, at Washington, D. C.:

> "For Your Information and That of United States Attorneys and Aliens and Their Attorneys the Instruction to You of October Twenty First to Take Into Custody and Detain the Alien Communists Was Issued Only After the Cases Had Been Examined in the Light of the Internal Security Act of Nineteen Fifty and the Spirit and Intention Thereof and All of the Factors Concerning the Likelihood of the Deportability and the

Activities of Said Alien Had Been Given Careful Consideration as Well as the Factors of Undue Hardship Which Continued Detention Might Impose Stop As You Have Already Been Instructed the Hearings and Steps Towards Disposition of These Cases Are To Be Given Top Priority Stop Also as you Have Been Advised These Aliens Were Ordered Detained by Authority of the Attorney General Delegated to Me by Section Nine Zero Point One of Title Eight CFR Paren Twelve FR Five Zero Seven Two July Thirty One Nineteen Forty Seven Paren Under Section Thirty Seven of the [fol. 154] Alien Registration Act of Nineteen Forty Comma Eight USC Four Five Eight''.

XI

That on October 31, 1950, while the said petitioner continued in custody under the warrant of arrest issued on July 8, 1949, a new warrant of arrest was issued by authority of the Attorney General charging that she was subject to deportation under the Act of October 16, 1918 (8 U. S. C. 137), as amended by the Internal Security Act of 1950, and served upon the said petitioner, which said warrant of arrest of October 31, 1950, superseded the said warrant of arrest issued on July 8, 1949; a copy of which said warrant of arrest of October 31, 1950, is attached hereto as a part of this return and marked Exhibit "C".

XII

That pursuant to outstanding instructions from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., the case of petitioner, as other deportation cases under the Act of October 16, 1918, as amended (8 U. S. C. 137), has been given first priority in expediting hearing, to the end that the said case may be disposed of as speedily as possible, but delay has been encountered from counsel for the petitioner, as recited in more detail in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

[fol. 155]

XIII

That the Acting Commissioner of Immigration and Naturalization, Washington, D. C., acting for the Attorney General, has exercised the grant of statutory discretion in Sec-

tion 20 of the Immigration Act of 1917 (8 USC 156), as amended by the Internal Security Act of 1950, to take the said petitioner into custody and to continue her in custody without bond pending final determination of her deportability, and in exercising said discretion to detain the said petitioner without bond the Acting Commissioner of Immigration and Naturalization, Washington, D. C., has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program of the Communist Party, the central purpose of which is to subvert the existing Government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship committed to the destruction of individual liberty and private property; and that, moreover, said facts cause the said Acting Commissioner to believe that if the said petitioner were enlarged on bail she would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States—which findings the said Acting Commissioner has communicated to respondent on the basis of facts which respondent has communicated to the said Acting Commissioner, tend-
[fol. 156] ing to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party, as recited herein.

Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the writ of habeas corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service, United States Department of Justice, District No. 16.

[fol. 157] EXHIBIT "A" TO RETURN

Copy

Warrant for Arrest of Alien
United States of America, Department of Justice,
Washington

1600-52336
No. A-5822361

To District Director of Immigration and Naturalization, Los Angeles, California or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Miriam Christine Stevenson, formerly Burroughs, nee Krenkel, alias Miki Ashton who entered this country at San Ysidro, California on the 26th day of December, 1928 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The Immigration Act of May 26, 1924, in that at the time of entry, she was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; the Act of October 16, 1918, as amended, in that she was, after entry, a member of the following class, set forth in Section 1 of said Act; An alien who is a member of an organiza- [fol. 158] tion, association, society, or group that advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; and the Act of October 16, 1918, as amended, in that she was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays any written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant her a hearing to

enable her to show cause why she should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1950." Authority has been granted for release under bond in the sum of $2000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 8th day of July, 1949.

(S.) W. F. Kelly, Assistant Commissioner, Enforcement Division.

[fol. 159] EXHIBIT "B" TO RETURN

IN THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Comes now Herman R. Landon, respondent herein, who states and deposes, as follows:

I. That he is District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said district.

II. With respect to Miriam Christine Stevenson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that the petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; that she was the Secretary of a Communist Party Unit in 1938; that she participated in the "Lenin" celebration in Los Angeles; that she admitted in 1948 attending Communist Party meetings and also admitted membership in the American League for Peace and Democracy (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that she was a correspondent [fol. 160] of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and that in 1950 at a deporta-

tion hearing she refused to answer questions concerning her membership in the Communist Party on the ground of self-incrimination.

III. That the Service records show with respect to petitioner's hearings under Service Warrant of Arrest (Government's Exhibit "C") that there have been undue delays in hearings thereunder. The case was first scheduled for hearing November 30, 1950 but taken off calendar at the request of petitioner's counsel. It was next set for a hearing on December 6, 1950 and continued on motion of petitioner's counsel. It was again set for hearing on December 11, 1950 and again continued to December 14, 1950 on motion of petitioner's counsel. On the latter date, the case was again continued on motion of petitioner's counsel to December 15, 1950. On the latter date, it was again continued on motion of petitioner's counsel and date set for January 5, 1951.

(S.) Herman R. Landon.

Subscribed and sworn to before me this 4th day of January, 1951. Edmund L. Smith, Clerk U. S. District Court. By: Michael F. Leone, Deputy Clerk. (Seal.)

[fol. 161] EXHIBIT "C" TO RETURN

Copy

Warrant

For Arrest of Alien

United States of America

Department of Justice

Los Angeles, California

1600-52336
No. A-5822361

To District Enforcement Officer, Los Angeles, California or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Miriam Christine Stevenson, formerly Burroughs nee Krenkel alias Miki Ashton who entered this country

at San Ysidro, California on the 26th day of December, 1928 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that she has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and in conformity with law. The expenses of detention, hereunder, if necessary, are [fol. 162] authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951." Pending determination, of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 8th day of July, 1949.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

[fol. 163] *Duly sworn to by Herman R. Landon. Jurat omitted in printing.*

[fol. 164] (Title of District Court and Cause)

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged this 4 day of January, 1951, of a copy of the Return to Writ of Habeas Corpus in the above-entitled and numbered case.

Rose S. Rosenberg, Attorney for Petitioner, by (S.) Rose S. Rosenberg.

[File endorsement omitted.]

[fol. 165] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS—Filed January 5, 1951

Comes now Miriam Christine Stevenson, petitioner herein, and for her answer to the Return of H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, respondent herein, admits, denies and alleges as follows:

I

Alleges that such Return in whole, including exhibits thereto, fail to set forth facts to show any cause why the writ prayed for by the *petioner*, on file herein, should not be granted, and fails to set forth facts sufficient to constitute a return to the writ herein, and the detention of the petitioner herein is, therefore, unlawful, unconstitutional, and in violation of the mandate of the Court of Appeals in this cause.

II

Allegations with respect to delay are not responsive to writ nor do they furnish any fact to justify detention of petitioner herein.

III

In addition, the petitioner alleges that a final order of deportation cannot be made by the administrative body in less than a period of at least one year or more for the following reasons:

That deportation hearings before a local hearing examiner [fol. 166] of the Immigration and Naturalization Service will consume at least a period of six months, there having already elapsed a period of over two months since petitioner has been detained;

That the continuances requested by counsel and granted by the Hearing Officer were those normally involved in such proceeding, due, among other reasons, to preparation required for the case; securing of witnesses, and argument in the Circuit Court of Appeals in the cause herein; that several weeks will be required for the Hearing Officer to make findings and recommendations; that thereafter such Commissioner in Washington, D. C. who upon the examination of the complete record will make a ruling thereon,

which procedure will take at least six weeks. An appeal from such ruling, taken by either party to the Board of Immigration Appeals will require a minimum of three months; thereafter the Board of Immigration Appeals must make its final decision which, depending on the calendar, would normally consume four weeks. Thus merely to exhaust the administrative remedies to which the parties are entitled would require at least one year. Petitioner is not here setting forth the time that would be required to have a final adjudication of the deportation order, it being sufficient for the present purposes to point out that the judicial review to which the parties are entitled would necessarily consume a period of at least two years.

[fol. 167] IV

Refers to the allegations of her Petition for Writ of Habeas Corpus on file herein, set forth in Paragraphs I to XXIII inclusive, and by this reference incorporates each and all of the allegations thereof as if the same were fully set forth herein.

Wherefore, petitioner prays that a Writ of Habeas Corpus issue and that she be forthwith restored to her liberty upon reasonable bond.

(S.) Rose S. Rosenberg, Attorney for Petitioner.

Duly sworn to by Rose S. Rosenberg. Jurat omitted in printing.

[fol. 168] Received copy of the within Traverse to Return this 5 day of January, 1951.

(S.) Walter S. Binns, Attorney for ——.

[File endorsement omitted.]

[fol. 169] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL RETURN TO WRIT OF HABEAS CORPUS—Filed January 9, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, here-

with supplement my Return to Writ of Habeas Corpus in the above entitled matter, and in answer to petitioner's Traverse thereto filed deny and allege as follows:

I

In answer to paragraph III thereof respondent alleges that a final order of deportation would be entered much sooner in the year if the petitioner consented to the holding of hearings, and specifically alleges that during the two months since the petitioner has been in custody, said hearing has been continued four times on motion of petitioner.

II

In answer to paragraph IV thereof, which incorporates by reference the petition heretofore filed, respondent has no information and belief and therefore denies all of the allegations contained therein.

III

In answer to paragraph XVII thereof, respondent denies that petitioner has been a law-abiding citizen since her residence in the State of California, City of Los Angeles and alleges that petitioner has been a member of the Communist party during all of said time.

[fol. 170] Wherefore, I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Dated: January 8, 1951.

[fol. 171] In United States District Court

Minute Entries of Trial

At a stated term, to wit: The September Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of

Los Angeles on Thursday the 11th day of January in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Ben Harrison, District Judge.

In re Frank Carlson, aka Solomon Skolnick, No. 12491-BH-Civil.

In re Miriam Christine Stevenson, etc., No. 12492-BH-Civil.

In re Harry Carlisle, aka Harry Carlyle, No. 12503-BH-Civil.

In re David Hyun, No. 12505-BH-Civil.

For further hearing on Return of Writ; John W. Porter, Esq., appearing as counsel for Frank Carlson, petitioner in Case No. 12491-BH; Rose S. Rosenberg, Att'y, appearing as counsel for Miriam Christine Stevenson, petitioner in Case No. 12492-BH; Stanley Fleishman, Esq., appearing as counsel for Harry Carlisle, petitioner in Case No. 12503-BH; Milton S. Tyre, Esq., appearing as counsel for David Hyun, petitioner in Case No. 12505-BH; Walter S. Binns, Ass't U. S. Att'y, appearing as counsel for respondent; all four said petitioners being present;

Court makes a statement relative to the delay of the hearings of the deportation proceedings pending before the Immigration Service. Attorney Porter makes a statement of objections on behalf of Petitioner Carlson to the taking herein of evidence relative to the deportation hearings. [fol. 172] Attorneys Rosenberg, Fleishman, and Tyre, on behalf of the respective petitioners for whom they appear, state that they join in the objections made on behalf of Petitioner Carlson.

The Court thereupon directs that the hearing officers be called to the stand, and thereupon

John B. Bartus and Roy Waddell, respectively, are called, sworn, and testify relative to the hearings in the deportation proceedings.

The Court makes a further statement and states that the burden now shifts to the aliens, petitioners herein, to establish by competent evidence the allegations of their petitions wherein it is stated that the action of the Attorney General in detaining them without bail is arbitrary and capricious. The Court states that it now offers an opportunity to each of the petitioners to take the stand in their own behalf.

Attorney Porter makes a statement that he submits the petition of Carlson on the present state of the record. The

Court calls Petitioner Carlson to the stand, and his counsel objects thereto. Petitioner Carlson states that he desires to follow the advice of his counsel and not testify herein.

Attorney Rosenberg states that she takes the same position respecting the petitioner Stevenson, as counsel for petitioner Carlson. The Court inquires of Petitioner Stev- [fol. 173] enson if she desires to take the stand and the petitioner says that she takes the advice of her counsel not to testify.

Attorney Fleishman for Petitioner Carlisle states that he takes the same position as counsel for Petitioner Carlson. The Court inquires of Petitioner Carlisle if he desires to take the stand, and Carlisle states that he desires to follow the advice of his counsel and not testify herein.

Attorney Tyre makes a statement of objections to respondent filing a supplemental return in the David Hyun matter, and moves that the said supplemental return be stricken. The Court denies said motion to strike said supplemental return.

At the request of Attorney Tyre, Court at hour of 2:40 PM recesses.

At 2:57 court reconvenes herein and all being present as before, including all four petitioners and counsel for both sides.

Attorney Tyre makes a statement to the Court that Petitioner Hyun does not desire to testify herein. In answer to the Court's question Petitioner Hyun states that on advice of his counsel he does not desire to testify herein.

Counsel for each of the petitioners states to the Court that the matter is submitted on the record in this proceeding.

The Court makes a statement of its decision in each of these matters, and directs counsel for the respondent in [fol. 174] each case to prepare and present form of written order for signature, that the petition for Writ of Habeas Corpus is dismissed, and that the Writ of Habeas Corpus issued herein is discharged.

Attorney Porter moves that the Court fix bail pending appeal in the Carlson case. The Court makes a statement that it will not grant bail pending appeal in any of these cases.

Attorney Fleishman makes a statement relative to the condition of the health of Petitioner Carlisle, and presents two affidavits, which are filed herein, and requests that bail

be fixed pending appeal. Attorney Binns makes a statement and presents letter dated Jan. 8, 1951, from F. C. Stewart, Medical Director, Public Health Service, which is filed herein.

The Court makes a further statement relative to an examination of Petitioner Carlisle and report to the Court by an independent medical doctor. Attorney Fleishman states that he desires such an examination and report.

The Court states that it denies the motions for fixing of bail as to Petitioners Carlson, Stevenson, and Hyun, but that as to Petitioner Carlisle the application for fixing of bail pending appeal will now be taken under submission, and directs counsel to confer relative to a doctor to make an examination of Petitioner Carlisle and report to the Court.

Attorney Rosenberg makes further statement to the Court on behalf of Petitioner Stevenson in support of [fol. 175] release on bail pending appeal.

The Court and Attorneys Porter and Fleishman make further statements.

[fol. 176] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—January 22, 1951

The above matter having come on for hearing upon the writ of habeas corpus on the 9th day of January 1951, at 2:00 P.M., and on the 11th day of January 1951 at 2:00 P.M., before the Honorable Ben Harrison, Judge presiding, Rose S. Rosenberg appearing as attorney for petitioner, and Ernest A. Tolin, United States Attorney, by Walter S. Binns, Chief Assistant, appearing as attorneys for respondent Herman R. Landon, District Director of Immigration and Naturalization Service, and said respondent having filed his Return and Supplemental Return to the Writ of Habeas Corpus, and petitioner having filed his Traverse to said Return, and the Court having heard oral argument and considered the Affidavit filed by respondent together with the Return, and having taken evidence as to the progress of the deportation hearings being considered before a hearing officer of the Immigration and Naturalization Service, and petitioner not desiring to submit evidence, the Court makes its findings of fact and conclusions of law.

Findings of Fact

I

That Miriam Christine Stevenson is an alien and a native and subject of Great Britain, born at London, England, on August 26, 1907.

[fol. 177]

II

That petitioner was taken into custody on July 26, 1949, on a warrant of arrest issued by authority of the Attorney General on July 8, 1949, and was released from custody on a bond in the amount of $2,000.00.

III

That, after a hearing on said warrant of arrest, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung* v. *McGrath*, 339 U. S. 33.

IV

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings.

V

That on October 6, 1950, the respondent submitted to the Acting Commissioner a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens who were currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party.

[fol. 178]

VI

That on October 21, 1950, the respondent received a radiogram from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., directing him, among other things, to apprehend and detain all active communists

under deportation proceedings in his District. Thereafter, petitioner was re-arrested.

VII

That on October 31, 1950, a new warrant of arrest was issued by authority of the Attorney General charging that petitioner was subject to deportation as a person who had been, after entry into the United States, a member of the Communist Party. That pursuant to said instructions from the Attorney General, deportation hearings in petitioner's case were held on November 30, 1950, and were at that time taken off calendar. The case was next set for hearing on December 6, 1950, on which date it was continued for hearing on December 11, 1950, and again continued to December 14, 1950. On the latter date it was continued to December 15, 1950, at which time it was set for hearing on January 5, 1951, all at the request of petitioner.

VIII

The Acting Commissioner of Immigration was in possession of evidence that said petitioner was a member of the Communist party of the United States as was set forth in the Affidavit filed with the Return, as follows:

[fol. 179] "With respect to Miriam Christine Stevenson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that the petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; that she was the Secretary of a Communist Party Unit in 1938; that she participated in the "Lenin" celebration in Los Angeles; that she admitted in 1948 attending Communist Party meetings and also admitted membership in the American League for Peace and Democracy (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); and that in 1950 at a deportation hearing she refused to answer questions concerning her mem-

bership in the Communist Party on the ground of self-incrimination."

IX

The Court takes judicial notice that a state of emergency exists and that an undeclared war is being waged in Korea between the Armed Forces of the United States and the armed forces of Communist China.

[fol. 180] CONCLUSIONS OF LAW

I

The Attorney General, through the Immigration and Naturalization Service, has exercised discretion in determining that petitioner Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, be retained in custody pending deportation.

II

The retention of Miriam Christine Stevenson in custody pending deportation was not arbitrary or capricious.

III

There is substantial evidence to support the decision of the Attorney General, acting through the Immigration and Naturalization Service, to retain petitioner Miriam Christine Stevenson in custody.

IV

Petitioner is not being illegally restrained by respondent but is in custody of respondent under proper and lawful order.

V

The Writ of Habeas Corpus is and should be discharged and dismissed.

(S.) Ben Harrison, United States District Judge.
Dated: January 22, 1951.

Approved as to Form: Rose S. Rosenberg, Attorney for Petitioner.

[fol. 181] [File endorsement omitted.]

[fol. 182] IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12492-BH

In the Matter of MIRIAM CHRISTINE STEVENSON, Formerly BURROUGHS, nee KENKEL, alias MIKI ASHTON, Petitioner for Writ of Habeas Corpus.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT

The mandate of the Circuit Court of Appeals for the Ninth Circuit was spread in the District Court on December 27, 1950. The Court thereupon, in accordance with the mandate, ordered the issuance of writ of Habeas Corpus directed to Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, and set January 5, 1951 as the return date on the said writ. On said date the Court set the matter for hearing on January 9, 1951, the petitioner being represented by her counsel Rose S. Rosenberg, and the respondent by his counsel Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns, Chief Assistant United States Attorney, and the Court having read the Return and the Traverse on file and the Supplemental Return and having read and considered the Affidavit filed by respondent in addition to the Return and heard arguments, and further proceedings being had January 11, 1951, and the Court having taken evidence as to the [fol. 183] progress of the deportation hearing against Miriam Christine Stevenson, formerly Burroughs, nee Kenkel, alias Miki Ashton, before a hearing officer of the Immigration and Naturalization Service;

And the petitioner personally and by her attorney not desiring to submit evidence;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed and the Writ of Habeas Corpus issued herein be and hereby is discharged, and the petitioner is remanded to the custody of the Immigration and Naturalization Service of the Department of Justice.

Dated: January 22, 1951.

(S.) Ben Harrison, United States District Judge.

Approved as to form: Rose S. Rosenberg, Attorney for Petitioner. Judgment entered Jan. 2[illegible], 1951, Book 70, Page 382. Edmund L. Smith, Clerk, by (S.) Edw. F. Drew, Deputy Clerk.

[File endorsement omitted.]

[fol. 184] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—January 24, 1951

Notice is hereby given that Miriam Christine Stevenson, petitioner above named hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order discharging the writ of habeas corpus herein, made and entered in this action by the United States District Court, Honorable Ben Harrison, Judge Presiding, on the 22 day of January, 1951.

Dated: This 24 day of January, 1951.

(S.) Rose S. Rosenberg.

[fol. 185] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SUPPLEMENTAL RECORD ON APPEAL—Filed January 24, 1951

It is hereby stipulated by and between the undersigned counsel for the petitioner-appellant and for the respondent-appellee herein that the following documents and papers shall constitute the supplemental record on appeal to the United States Court of Appeals for the Ninth Circuit herein:

1. The Writ of Habeas Corpus issued herein on or about January 2, 1951.

2. The Return to Writ of Habeas Corpus of H. R. Landon, respondent herein, together with exhibits attached thereto, executed January 4, 1951.

3. The Traverse to Return to Writ of Habeas Corpus dated January 5, 1951.

4. The Supplemental Return to Writ of Habeas Corpus, together with Amended Affidavit of H. R. Landon attached thereto as Exhibit B.

5. The Amended Supplemental Return to Writ of Habeas Corpus.
6. Reporter's Transcript.
7. Minute Order discharging writ and denying petition entered January —, 1951.
8. Minute order denying application for bail pending appeal, entered January —, 1951.
9. Findings of Fact and Conclusions of Law made Jan-
[fol. 186] uary 22, 1951.
10. Order discharging writ and denying petition, entered January 22, 1951.
11. Notice of appeal dated January 22, 1951.
12. This stipulation.

Dated this 24th day of January, 1951.

(S.) Rose S. Rosenberg, Attorney for Petitioner-Appellant; Ernest A. Tolin, United States Attorney; (S.) Walter S. Binns, Chief Assistant, U. S., Attorney, Attorneys for Respondent-Appellee.

[File endorsement omitted.]

[fols. 187-188] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 189] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER OF SUBMISSION—December 1, 1950

Ordered (1) motions for bail pending appeal (2) that causes be heard on typewritten transcript of record and typewritten briefs, and (3) cause on merits, argued by Mr. John W. Porter, counsel for appellant Carlson, and by Mrs. Rose S. Rosenberg, counsel for appellant Stevenson, and by Mr. John Caughlan, counsel for appellants Mangaoang and Sasieff, and by Messrs. Walter Binns and John E. Belcher, Assistants United States Attorney, and by Mr. John P. Boyd, Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for con-

sideration and decision, counsel for respective parties to file further briefs in five days.

[fol. 190] Before Stephens, Healy and Bone, Circuit Judges

ORDER DIRECTING ENTRY OF JUDGMENT—December 16, 1950

Pursuant to the order this day filed, it is ordered that a judgment be filed and recorded in each of above causes in accordance with the opinion rendered in the companion cause of Frank Carlson vs. Landon, etc., No. 12742; opinion in these causes to follow:

[fol. 191] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MIRIAM CHRISTINE STEVENSON, etc., Appellant,

vs.

HERMAN R. LANDON, etc., Appellee

JUDGMENT—December 16, 1950

Appeal from the United States District Court for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and this cause be, and hereby is remanded to the said District Court with directions to the said District Court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with the opinion of this court in Case No. 12742.

(Endorsed) Ju .gment. Filed and entered December 16, 1950. Paul P. O'Brien, Clerk,

[fol. 192] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER DIRECTING FILING OF OPINION—December 20, 1950

Ordered that the typewritten opinion this day rendered by this Court in above causes be forthwith filed by the Clerk.

[fol. 193] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,743

MIRIAM CHRISTINE STEVENSON, Formerly Burroughs, nee Kenkel, Alias Miki Ashton, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,744

DAVID HYUN, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,745

Dec. 20, 1950

HARRY CARLISLE, Also Known as Harry Carlyle, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

Appeal from the United States District Court for the Southern District of California, Central Division

OPINION—December 20, 1950

Before Stephens, Healy and Bone, Circuit Judges

STEPHENS, Circuit Judge:

The appeals in the above entitled cases were decided and order entered on the 16th day of December, 1950, coincident

[fol. 194] with the decision and order in a like proceeding entitled *Carlson v. Landon*, No. 12,742. We noted in our memorandum, filed on the same date, that opinion in each case would follow. We combine the three in one opinion. The facts in each of the instant cases very largely parallel those set out in the *Carlson* case. The dates of the essential facts are not exactly the same in either case, but the variation of events and the dates of their happening are not great enough to make any particular difference. The applicable law, the principles applied and the reasoning and authority relied upon and set out in the *Carlson* case rule these cases and therefore we make specific reference thereto without repetition herein. The following alleged facts, undenied in the pleadings, are set out under the names of the three petitioners. Details as to each petitioner are set out in the petitions and we state their essence very briefly:

STEVENSON

Petitioner Stevenson was born in England in 1919. At the age of 12 years she was taken to Canada with her family. She entered the United States in 1923 and since has resided in Los Angeles, California. With her mother she visited Canada in 1928 for a few hours and later in the same year she went to Mexico for a few hours where she was married to a United States citizen. In 1929 she made inquiry of the Immigration and Naturalization Service as to applying for citizenship but her legal entrance into this coun[illegible] was questioned.

HYUN

The petition for Hyun sets out a seemingly long period of limited restraint under a bail bond given under an arrest for deportation prior to the amendment to the immigration laws by the Internal Security Act of 1950, and complete restraint without bail since October 21, 1950, under an arrest for deportation pursuant to such amendment.

Petitioner Hyun was born in Seoul, Korea; is 33 years of age; was taken to Hawaii at an early age and resided there until December, 1947. His schooling resulted in a bachelor of science degree. In school he appears to have been a leader in social and religious activities. Although disqualified for military service during the lafe war because of his status as an alien, he became Captain of Reserve Officers Training

[fols. 195-224] Corps at the University of Hawaii. He has applied for citizenship; is married and has two minor sons. He has resided in Los Angeles, California, since December, 1947, and has engaged in a useful occupation. Petitioner's petition is replete with a detailed account of his life. He denies that his release would be detrimental to the United States in any manner.

CARLISLE

The petitioner Carlisle was born in England in 1897 and has resided in Los Angeles, California, for the past 15 years. The orders in these cases dated December 16, 1950, are alike and are the same as in *Carlson* v. *Landon*, No. 12,742, 9 Cir., . . F.2d . . . . The text of the orders is repeated, to-wit:

The judgment is reversed and the cause is remanded with direction to the district court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with this opinion.

Reversed and remanded.

(Endorsed:) Opinion. Filed Dec. 20, 1950. Paul P. O'Brien, Clerk.

[fol. 225] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12505-Y

In the Matter of the Application of DAVID HYUN for a Writ of Habeas Corpus

DAVID HYUN, Petitioner,

vs.

H. R. LANDON, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 3, 1950

This petition is made by Mary Hyun, for and on behalf of her husband, David Hyun, hereinafter referred to as "Petitioner", for an application for a Writ of Habeas Corpus in his favor and on his behalf. In support of this application the Petitioner respectfully represents as follows:

I

Petitioner is at present imprisoned, detained, confined and restrained of his liberty and is being held without bail at Terminal Island, California by direction of H. R. Landon, District Director for Southern California of the Immigration and Naturalization Service of the United States [fol. 226] Department of Justice who at all times herein mentioned and is now acting as agent and for and on behalf of Howard McGrath, Attorney General of the United States. For this reason this petition is made and filed by Mary Hyun the Petitioner's wife.

II

The said imprisonment, detention, confinement and restraint are illegal for the reasons and on the grounds hereinafter stated.

III

On or about July 9, 1949 W. F. Kelly, Assistant Commissioner, Enforcement Division, United States Department of Justice, Washington, D. C. issued a warrant for the arrest of Petitioner for alleged violation of the Act of

October 16, 1918, as amended, in that he was an alien allegedly after entry and a member of the classes set forth in Section 1 of said Act. Said warrant for arrest also authorized the release of Petitioner under bond in the sum of $2000. Under said warrant Petitioner was arrested on or about July 25, 1949. Pursuant to the said authorization for release, he was released after arrest by furnishing bond as aforesaid on or about July 25, 1949 but conditioned upon his reporting in Los Angeles to a specified representative of said Service once weekly.

IV

Thereafter and on August 4, 1949 a hearing before the Immigration and Naturalization Service of the Department of Justice in the District of Los Angeles was scheduled. At that time Petitioner appeared and requested a continuance for the purpose of obtaining counsel. Thereafter and on August 15, 1949 a hearing was held before a Hearing Inspector for the said Service. At that time Petitioner was present. Thereafter and on August 25, 1949 a further hearing was held before an Inspector for said Service at which time again Petitioner was present. Over objections of Petitioner and his counsel said Service then scheduled further hearings for Honolulu, Territory [fol. 227] of Hawaii commencing January 9, 1950. Thereafter and on February 21, 1950 Petitioner was advised by said Service that the hearing scheduled for Honolulu had been indefinitely postponed. Thereafter and on March 28, 1950 Petitioner was advised that a further hearing was scheduled pursuant to the said warrant of arrest and charges contained therein for Los Angeles on April 10, 1950. Thereafter and on March 30, 1950 Petitioner was again advised that the scheduled hearing for April 10, 1950 had been cancelled. Thereafter and on May 15, 1950 Petitioner was advised that another hearing pursuant to said warrant of arrest and charges contained therein was scheduled in Los Angeles on June 13, 1950. Thereafter and on June 13, 1950 a further hearing was held before a Hearing Examiner for said Service at which time Petitioner was present. At the conclusion of said hearing the Hearing Examiner stated that there would be a further hearing to be scheduled before the Examining Inspector at a time to be determined by the Service and counsel for Petitioner

and at which time arguments on Petitioner's objections to the transfer of a further hearing to Honolulu would be made. Thereafter and on August 4, 1950 the Examining Officer for the Service and counsel for petitioner entered into a written stipulation by the terms of which any further hearing for the purpose of arguing the said objection to the transfer of the hearing to the Territory of Hawaii was cancelled, and the said objections were thereafter pursuant to said stipulation filed in writing with the Hearing Examiner. No further hearings have been scheduled since that date, and none is now scheduled. The hearing in Honolulu has not yet been scheduled for a date. The case of the United States against Petitioner has not been completed, nor has Petitioner yet presented his defense.

Following the arrest of Petitioner pursuant to said warrant on or about July 25, 1949, and his release on or about the same date under bond in the sum of $2000 conditioned upon his reporting at a certain time and place in the City of Los Angeles each and every week pending the final de- [fol. 228] termination of the deportation proceedings to a representative of said Service, Petitioner immediately thereafter did report weekly as required. Thereafter and on or about August 8, 1949 Petitioner was advised in writing by said Service that the reporting time was forthwith changed from weekly to monthly. Thereafter and continually since that date Petitioner has reported monthly on each and every date when required so to do to a representative of said Service in Los Angeles. On or about July 6, 1950 counsel for Petitioner requested the Respondent to eliminate the requirement of Petitioner's reporting monthly, weekly or at all as a condition of the said $2000 bond. Counsel was asked by said Director to refer said request to the Commissioner of Immigration and Naturalization Service in Washington, D. C. On or about July 12, 1950 said request was made in writing to the said Commissioner with a copy being forwarded to the Respondent. On or about *September 14, 1950* Petitioner through his said counsel received a written reply to said request of July 12, 1950 seeking to eliminate the reporting qualification of the bond. The said written response was signed by A. R. Mackey, Acting Commissioner. The said reply refused to grant the request for Petitioner to be relieved of his obliga-

tion to report periodically. The said written reply further stated as follows:

> "However, in view of your allegation that the requirement for reporting personally interferes with Mr. Hyun's employment, I suggest that you pursue this matter further with the District Director of this Service at Los Angeles. He may be able to work out a plan whereby the periodic report may be made in a manner or at a place more convenient to your client."

Petitioner was about to take up with the Los Angeles District Director such a plan when Petitioner was imprisoned and detained as hereinafter set forth.

[fol. 229]

V

At midnight on Saturday, October 21, 1950 Petitioner was arrested by direction of the Respondent and has been since that time continually in the custody of Respondent at Terminal Island, San Pedro, California where he is now imprisoned and detained without the right to post bond for his release.

VI

On October 25, 1950 Petitioner filed a Writ of Habeas Corpus in the above entitled Court as number 12461-C. Thereafter and on October 31, 1950 Respondent issued a new warrant for the arrest of Petitioner, which warrant was served upon Petitioner in the Federal Building at Los Angeles, California while Petitioner was still imprisoned and detained by and in the custody of the Respondent. The said warrant of arrest expressly set forth that it superseded the said warrant of arrest referred to in Paragraph III hereof, which previous warrant had been issued on July 9, 1949, pursuant to which Petitioner was arrested on or about July 25, 1949. The said warrant of arrest served on October 31, 1950 also expressly states that Petitioner is not to be enlarged on bail or otherwise.

VII

Petitioner is 33 years of age. He was born in Seoul, Korea. In May, 1924 at the age of 7 he was taken by his mother and father to the Territory of Hawaii where he continually resided without interruption from that date

until on or about December 3, 1947. In Hawaii he attended elementary and highschools and graduated from the University of Hawaii with a degree of Bachelor of Science in mathematics and physics in 1940. During his attendance at Kauai High School he was president of the Interscholastic Conference, which was a Conference covering the Territory of Hawaii. He was also editor of the High School Annual, an annual publication. He was also elected to represent the Koreans attending Kauai High School as a delegate to Y.M.C.A., church and student conferences. During his [fol. 230] last year at Kauai High School Petitioner worked for Kauai Telephone Company and the Electric Shop of Kauai as a telephone operator, among other jobs, by which he was able to earn some income. While in attendance at the University of Hawaii he was refused admission to a Reserve Officers Training Corps course for the reason that he was an alien. He nevertheless at his own expense took a course in this subject and became a captain of his company in the Reserve Officers Training Corps regiment of the University. At the University, he was elected into membership of the Engineers Club and as President of the Bhack Yong Whay fraternity. After graduation in 1940 he was engaged as a draftsman by W. A. Ramsey, Ltd., a sales engineering firm in Hawaii. During that same year he was elected Secretary of the Korean University Club. Also in 1940 he volunteered for service in the United States Army by registering under the Selective Service and Training Act of 1940, but was rejected because of his status as an alien. He never sought a deferment from service. While employed for W. A. Ramsey he spent virtually all of his time on vital defense work for Ramsey on behalf of the United States Army and Navy. Either in 1940 or 1942 he took out and filed in Hawaii his first United States citizenship papers in the hope that the law might change and permit him even as a Korean to become a United States citizen. Approximately four years ago he applied again for United States citizenship under what he believed was a new law which might permit him, as a Korean to become a citizen. On December 16, 1941 he became married to said Mary Hyun, a United States citizen by virtue of her birth in Hawaii, with whom he has had and now has two sons, aged 7 and 4.

In Hawaii after December 7, 1941 all aliens, including Petitioner, were subject to technical restrictions such as

curfew. Nevertheless, in 1942 Petitioner was given permission prior to the Battle of Midway and thereafter to serve as an air raid warden, and he did so serve. He also served in the Hawaiian Defense Volunteers which was a civilian [fol. 231] organization organized on a volunteer basis to aid the United States Army. From 1942 until 1946 he was employed as a Civil Service employee by the United States Engineers Corps engaged in vital work for the military service. He resigned to work as a draftsman for Guy N. Rothwell, architect in Hawaii, until Petitioner left for the Mainland. While in Hawaii Petitioner was a member of the Korean Methodist Church, of which his father for many years past and until he retired in 1940 was the Minister. He was also a member of the Korean Golf Club.

VIII

Petitioner, his wife and their two children arrived in Los Angeles from Hawaii on or about December 3, 1947. Shortly thereafter they rented premises at 3405 Marathon Street, Los Angeles, where they have been continually since that date and are now residing. Immediately adjacent to his home is the residence of the mother and father of Petitioner who have also continually resided there even prior to December 3, 1947. During 1948 and 1949 Petitioner attended the University of Southern California for three semester terms and for one summer term on a part time basis. Shortly after his arrival at Los Angeles he became employed as a draftsman for an architect for approximately one year, after which he was employed as a draftsman by A. Quincy Jones, Jr., licensed architect, for whom he has been continually since that date and is now employed. Petitioner took the California State Board architects' written and oral examinations and passed them. Subsequently and in April, 1950 he was issued his certificate as a licensed architect by the State of California, which license he now has.

IX

Since the outbreak of the Korean conflict on or about June 25, 1950 Petitioner has made no public utterances whatsoever concerning his opinion of the announced positions and policies of the United States or the Soviet Union or any other country which has expressed a position or [fol. 232] policy concerning the Korean conflict, notwith-

standing that Petitioner believes he would have a constitutional right so to do. Petitioner has at all times, and particularly since the warrant of arrest was served upon him on or about July 25, 1949, conducted himself in a lawful and respectful manner and as a loyal and peaceful citizen of this community and these United States. He has never been, except for the said warrant of arrest by said Service, charged or arrested for any crime or infraction of law whatsoever, except for minor traffic violations. Continually during the year last past Petitioner has been not only engaged for 8 hours each day for 5 days each week in his employment as a draftsman and later as an architect by A. Quincy Jones, Jr., but has spent a large amount of his time in other activities in connection with his profession. The Architects' Board examinations were given sometime in December, 1949. Petitioner together with other students starting in September and continually until the examination in December, 1949 took a course from an instructor in the downtown area of Los Angeles designed to prepare such students for the examinations. This course he attended 3 evenings each week. On at least 2 or 3 other evenings during that period he and other students had discussion groups for the purpose mutually of assisting each other to prepare for the examinations. After the examinations in December and until about April, 1950 he was engaged on some evenings in designing three separate residential buildings and also an addition to another residentjal building. After April, 1950 Petitioner began to spend the early portion of at least several evenings each week and most Saturdays and Sundays finishing up the design and physically assisting in the construction of an addition to a residential building in Los Angeles. Also for six or eight weeks after April, 1950 Petitioner took an additional course in engineering from the same instructor who taught him prior to the examinations in Los Angeles. This course he attended twice a week. He also spent a portion of other evenings during this period studying for this course.

[fol. 233] Since the said warrant of arrest was served upon Petitioner on or about July 25, 1949 and until his arrest on October 21, 1950 his general activities, demeanor and conduct have been substantially the same except that during the last year he has spent extra time as hereinabove set forth in connection with preparing for his examinations

and in engaging in outside work in his profession. Petitioner has neither said nor done anything, nor acted in any way whatsoever so as to form a reasonable or probable basis to cause him at this time to be arrested and imprisoned without the privilege of being enlarged on bond, or so as to indicate or tend to indicate that he would be, if he were free on bail, either a danger or a threatened danger to the safety of the public or of any person or to the security of this community or the United States.

X

Since the said warrant of arrest was served on or about July 25, 1949 Petitioner has not been served or otherwise notified in any way whatsoever by either the Respondent or his representatives or by any other governmental agency or by any other person or party that anything he was doing or saying or any other activity in which he has been or was then engaged would or might subject him to further arrest or detention in the manner in which he was so arrested and detained on or about October 21, 1950. Prior to his arrest at midnight on October 21, 1950 Petitioner was given no notice until the time he was actually arrested that he would be so arrested, nor was he given any opportunity whatsoever to show cause why he should not be so rearrested or be held without the privilege of supplying bond for his release. Until November 1, 1950 Petitioner had not been supplied or informed by the Respondent or anyone else of the reasons or basis for his rearrest at midnight on October 21, 1950, or for his imprisonment or detention without bail. On November 1, 1950 Respondent filed in the above entitled Court a supplemental return to the order to show cause why a writ of habeas [fol. 234] corpus should not be granted in the aforementioned case No. 12461-C. In paragraph III of said return Respondent states: "There is reasonable cause to believe that if the said Petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." What past activities form the basis for this legal conclusion, or what sort of activities are allegedly anticipated are not set forth either in general terms or specifically. In fact, the language hereinabove quoted from paragraph III of the said supplemental return is the only statement of any kind referring to an alleged basis for rearresting without notice or hearing and holding Petitioner

without bail. As recently as on or about October 8, 1950 Petitioner reported as per the Respondent's requirement to a representative of Respondent in Los Angeles and at said time, Mary Hyun is informed and believes from what Petitioner told her and on that ground alleges that, he was told nothing whatsoever to advise or indicate to him that he would be rearrested or that there was any cause or basis for said rearrest or his being held thereafter without the opportunity of posting bond for his release.

XI

The rearrest of Petitioner on October 21, 1950 and his second rearrest while still under imprisonment and detention by and custody of the Respondent and Petitioner being held without the right to post bail for his release are illegal and unconstitutional for the reasons hereinbelow set forth:

A. Section 23(a) of the Internal Security Act of 1950 which amends Section 20(a) of the Immigration Act of February 5, 1917, as amended (39 Stat. 890; 57 Stat. 553; 7 U.S.C. 156) under which Petitioner's detention and confinement is made does not apply to Petitioner nor to any alien who previously to the passage of said Act has been arrested pursuant to warrant and was on the date of the passage of said Act already released on bond.

[fol. 235] B. Section 23(a) of said Act as applied to Petitioner by the Respondent is unconstitutional because it violates Petitioner's rights under the First and Fifth Amendments to the United States Constitution.

C. Even if said Act is applicable to Petitioner and is otherwise constitutional, Respondent has abused the discretion granted to him thereunder and has exercised it unreasonably, arbitrarily and capriciously since no reasonable investigation was made prior to arrest to determine if there were a lawful basis for such arrest; and Respondent has failed to consider (1) the probability of the unconstitutionality not only of the Internal Security Act of 1950 but also the Act of October 16, 1918 as amended, under which Petitioner is now charged and said deportation proceedings were begun, (2) whether or not there is any probable danger or threatened danger to the public safety by Petitioner's presence within the community based upon anything which Petitioner has said or done, (3) the likely availability of

Petitioner for subsequent proceedings if he were to be enlarged on bail, or (4) the hardship not only upon Petitioner but upon his family as a necessary result of such detention and imprisonment without bail.

D. Service of the Warrant of arrest upon Petitioner on October 31, 1950 while he was under arrest by and in the custody of Respondent makes the said warrant and arrest and detention thereunder void and of no effect.

XII

At the first hearing on the petition for writ of habeas corpus in the above mentioned matter immediately following the arrest of petitioner pursuant to the warrant of October 31, 1950 Petitioner moved to dismiss without prejudice said petition for a writ on the ground that said petition had become moot. The motion to dismiss was granted without any ground therefor or qualification thereof being stated. Thereafter an order of dismissal was filed in said case.

[fols. 236-237] Wherefore, your Petitioner prays that a writ of habeas corpus may be issued directed to H. R. Landon, Los Angeles District Director for Los Angeles of the Immigration and Naturalization Service, United States Department of Justice; to the United States Marshal for this District; and to any and all other law enforcement or peace officers who may have custody of Petitioner, commanding them, and each of them, to have the Petitioner before this Court at a time and place therein specified to do and receive what shall then and there be considered by said court concerning Petitioner so restrained, the cause of his detention, and said writ; that Petitioner may be restored to his liberty upon posting the same bond in the sum of $2000 which has heretofore been posted and which is still in Respondent's possession; and for such other and further relief as to this Honorable Court may seem proper in the premises.

Mary Hyun, for and on behalf of David Hyun, Petitioner.

Milton S. Tyre, Attorney for Mary Hyun and Petitioner, David Hyun.

[fol. 238] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED—November 3, 1950

Upon reading the verified petition for a writ of habeas corpus on file herein, and it appearing therefrom to the Court that this is a proper instance for the following order, and good cause appearing therefor;

It is hereby ordered that H. R. Landon, District Director for Los Angeles of United States Immigration and Naturalization Service, Department of Justice, be and appear before Honorable Ben Harrison, Judge in Department 6 on the 6th day of November, 1950, at 2:00 P.M. of said day, then and there to show cause, if any he may have, why a writ of habeas corpus should not be granted restoring Petitioner [fols. 239-240] David Hyun to his liberty upon posting with the Respondent a bond in the same form as previously posted by him with you or your representative in the sum of $2000, or, if said bond has not been revoked or exonerated, why the same bond should not be deemed posted and continuing in effect, or on such other conditions as to this Court may seem proper in the premises.

Dated: November 3rd, 1950.

Ben Harrison, Judge.

[fol. 241] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 6, 1950

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to order to show cause why writ of

habeas corpus should not be granted in the above entitled case, respectfully states:

I

That David Hyun, hereafter referred to as the petitioner is not being illegally restrained by me of his liberty, but is in my custody under proper and lawful authority.

II

That the said petitioner is in my custody pursuant to a warrant of arrest, dated October 31, 1950, issued by authority of the Attorney General, directing that the petitioner [fol. 242] be taken into custody and granted a hearing to enable him to show cause why he should not be deported in conformity with law, a certified copy of which is attached hereto as a part of this return and marked Exhibit "A."

III

That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the said petition for issuance of a writ of habeas corpus in the case of the petitioner be denied.

Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

[fol. 243] *Duly sworn by Herman R. Landon. Jurat omitted in printing.*

[fol. 244] ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged this 6th day of November, 1950, of a copy of the Return to Order to Show Cause Why Writ of Habeas Corpus Should not be Granted, in the above-entitled and numbered case.

Milton S. Tyre, Attorney for Petitioner, By B. Shapiro, Secretary.

[fol. 245] EXHIBIT "A" TO RETURN

United States of America

Department of Justice

Immigration and Naturalization Service

Los Angeles, California

November 6, 1950.

Certification

By virtue of the authority vested in me by 8 C.F.R. 383.7, a regulation issued by the Commissioner of Immigration and Naturalization with the approval of the Attorney General pursuant to 5 U.S.C. 22 and 311, and 8 U.S.C. 102, 222, 458 and 727,

I hereby certify that the annexed document, a Warrant of Arrest, is a true copy of the original thereof from the records of the said Immigration and Naturalization Service, Department of Justice, relating to David Hyun, File No. 1600-61258, of which the Attorney General is the legal custodian.

In Witness Whereof I have herennto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

Herman Landon, District Director, Immigration and Naturalization Service. (Seal.)

[fols. 246-247] Warrant for Arrest of Alien

United States of America

Department of Justice

Los Angeles, Calif.

1600-61258

No. A-3611569

To District Enforcement Officer, Los Angeles, California
Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien, David Hyun, who entered this country at Honolulu, T. H. ex SS. "President Cleveland" on the 24th day of May, 1924 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 7th day of July, 1949.

For so doing, this shall be your sufficient warrant.
Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

[fol. 248] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT BE GRANTED—Filed November 6, 1950

David Hyun, the petitioner in the above entitled matter, hereby files his traverse to the return to order to show cause why writ should not be granted, which return was executed by the Respondent in the above entitled matter and served upon counsel for Petitioner on November 6, 1950.

I

Petitioner denies that he is being legally restrained of his liberty, and further denies that he is in the custody of the Respondent under proper and lawful authority, and in this connection alleges that he is in custody of the Respondent [fols. 249-250] but under improper and unlawful authority.

II

Petitioner further denies the alleged allegations contained in Paragraph III of the said return, and in this connection alleges that there is no danger, either probable or threatened, to the public safety by Petitioner being enlarged upon bail.

Wherefore, Petitioner prays that the application heretofore filed in the above matter be granted.

David Hyun, Petitioner.

Duly sworn to by David Hyun. Jurat omitted in printing.

[fol. 251] UNITED STATES DISTRICT COURT, CENTRAL DIVISION, SOUTHERN DISTRICT OF CALIFORNIA

12505-Y

WRIT OF HABEAS CORPUS

The President of the United States of America

To: H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California—Greeting:

You are hereby commanded, that the body of David Hyun by you restrained of his liberty, as it is said detained by whatsoever names the said David Hyun may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Ben Harrison, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles at 10:00 o'clock a.m., on the 5th day of January, 1951, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Ben Harrison, United States District Judge at Los Angeles, California this 2nd day of January, A. D. 1951.

Edmund L. Smith, Clerk. By Murray E. Wire, Deputy Clerk. (Seal.)

[fol. 252] United States Marshal's Return

So. District of Calif., ss:

Received the within writ the 3 day of Jan., 1951, and executed same.

Serving H. R. Landon by leaving writ with Mr. H. A. Field, Room #631, Fed. Bldg., L. A.

James J. Boyle, U. S. Marshal, by Travis F. Oltman, Deputy Marshal.

Marshal's Fee—$2.00.

[fol. 253] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12505-BH

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS—Filed January 4, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to writ of habeas corpus in the above entitled case, respectfully state:

I

That David Hyun, hereafter referred to as the petitioner, is not being illegally restrained by respondent of his liberty, but is in respondent's custody under proper and lawful authority.

II

That the said petitioner is an alien, who was born at Seoul, Korea on or about January 3, 1917 and entered the United States as a citizen of China.

III

That a warrant for the said petitioner's arrest was issued by authority of the Attorney General on July 7, 1949, charging that he was subject to deportation under the Act of October 16, 1918, as amended (8 USC 137), a certified copy of which warrant of arrest is attached hereto as a part [fol. 254] of this return and marked Exhibit "A."

IV

That the said petitioner was taken into custody on the aforesaid warrant of arrest on July 25, 1949, and on the same date was released from custody on a delivery bond in the sum of $2,000.

V

That, after a hearing on said warrant of arrest, to give said petitioner an opportunity to show cause why he should

not be deported, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung* v. *McGrath*, 339 U.S. 33.

VI

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings on charges under the Act of October 16, 1918, as amended (8 USC 137).

VII

That on October 6, 1950, the District Director of Immigration and Naturalization, Los Angeles, California, submitted to the Acting Commissioner of Immigration and Naturalization, Washington, D. C., a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all of whom were the subjects of pending deportation proceedings under the Act of October 16, 1918, as amended (8 USC 137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B."

VIII

[fol. 255] That on October 21, 1950, the following instructions were received by the District Director of Immigration and Naturalization, Los Angeles, California, by radio from the Acting Commissioner of Immigration and Naturalization, Washington, D. C.:

> "Apprehend immediately and detain the following aliens pursuant to Section Twenty of Nineteen Seventeen Act as amended by Internal Security Act: David Hyun and Harry Carlisle and Solomon Sokolnick. Also

apprehend and detain all active Communists under proceedings in your District unless detention would result in severe hardship because of individual's physical condition or family situation. Give priority to those named."

IX

That pursuant to the aforesaid instructions the petitioner was taken into custody on October 21, 1950, on the aforesaid warrant of arrest issued on July 7, 1949.

X

That on October 27, 1950, the following radiogram was received by the District Director of Immigration and Naturalization, Los Angeles, California, from the Acting Commissioner of Immigration and Naturalization, at Washington, D. C.:

"For your information and that of United States Attorneys and aliens and their Attorneys the instruction to you of October Twenty First to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit of intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued detention might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases [fol. 256] are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by Section Nine Zero Point One of Title Eight CFR Paren Twelve FR Five Zero Seven Two July Thirty One Nineteen Forty Seven Paren under Section Thirty Seven of the Alien Registration Act of Nineteen Forty Comma Eight USC Four Five Eight."

XI

That on October 31, 1950, while the said petitioner continued in custody under the warrant of arrest issued on July 7, 1949, a new warrant of arrest was issued by authority of the Attorney General charging that he was subject

to deportation under the Act of October 16, 1918 (8 USC 137) as amended by the Internal Security Act of 1950, and served upon the said petitioner, which said warrant of arrest of October 31, 1950, superseded the said warrant of arrest issued on July 7, 1949; a copy of which said warrant of arrest of October 31, 1950, is attached hereto as a part of this return and marked Exhibit "C".

XII

That pursuant to outstanding instructions from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., the case of petitioner, as other deportation cases under the Act of October 16, 1918, as amended (8 USC 137), has been given first priority in expediting hearing, to the end that the said case may be disposed of as speedily as possible, the status of which hearing is recited in more detail in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

XIII

That the Acting Commissioner of Immigration and Naturalization, Washington, D. C., acting for the Attorney General, has exercised the grant of statutory discretion in Section 20 of the Immigration Act of 1917 (8 USC 156), as amended by the Internal Security Act of 1950, to take the said petitioner into custody and to continue him in custody without bond pending final determination of his deportability, and in exercising said discretion to detain the said [fol. 257] petitioner without bond the Acting Commissioner of Immigration and Naturalization, Washington, D. C., has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program of the Communist Party, the central purpose of which is to subvert the existing Government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship committed to the destruction of individual liberty and private property; and that, moreover, said facts cause the said Acting Commissioner to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States—which

findings the said Acting Commissioner has communicated to respondent on the basis of facts which the respondent has communicated to the said Acting Commissioner, tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party, as recited herein.

Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

[fol 257a] EXHIBIT "A" TO RETURN

Warrant for Arrest of Alien

United States of America

Department of Justice

Washington

1600-61258
No. A-3611569
To District Director of Immigration and Naturalization, Los Angeles, California

Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien, David Hyun, who entered this country at Honolulu, T.H. ex SS "President Cleveland" on the 24th day of May, 1924, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that ad-

vises, advocates, or teaches the overthrow, by force or violence of the Government of the United States; and the Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays any written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1950." Authority has been granted for release under bond in the sum of $2000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 7th day of July, 1949.

(S.) W. F. Kelly, Assistant Commissioner, Enforcement Division.

dmg.

[fol. 258] EXHIBIT "B" TO RETURN

In the United States of America—Southern District of California, Central Division

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Comes now Herman R. Landon, respondent herein, who states and deposes, as follows:

I. That he is District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said district.

II. That with respect to David Hyun, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist

Party and has actively participated in its program; more specifically, that said petitioner was a member of the Communist Party in the Territory of Hawaii and was instrumental in reactivating the Communist Party in Hawaii in 1945; that he was a member of the Executive Board of the Communist Party in Hawaii in 1946; that he led and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the Communist Party during the years 1946 and 1947; that he advocated re-distribution of wealth and Government ownership of industry, such as exists in Russia, and that these reforms would take place following the revolution in the United States; that said petitioner was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); and that he was educational director of the Westlake Section of the Communist Party in Los Angeles, California in 1949.

III. That the Service records show with respect to petitioner's hearings under Service Warrant of Arrest (Government's Exhibit "C") that date for hearing was first set [fol. 259] on November 22, 1950 and held over objections of petitioner's counsel who requested continuance. Further hearings were continued for the purpose of causing depositions to be taken from certain Government witnesses in Hawaii.

Herman R. Landon.

Subscribed and sworn to before me this 4th day of January, 1951. Edmund L. Smith, Clerk, U. S. District Court, by Michael F. Lane, Deputy Clerk. (Seal.)

[fol. 260] EXHIBIT "C" TO RETURN

Warrant for Arrest of Alien

United States of America

Department of Justice

Los Angeles, Calif.

1600-61258

No. A-3611569

To District Enforcement Officer, Los Angeles, California Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien, David Hyun, who entered this country at Honolulu, T. H. x SS "President Cleveland" on the 24th day of May, 1924, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 7th day of July, 1949.

For so doing, this shall be your sufficient warrant.
Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

[fol. 261] *Duly sworn to by Herman R. Landon. Jurat omitted in printing.*

[fols. 262-264] ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged this January 4, 1951, of a copy of the Return to Writ of Habeas Corpus, in the above-entitled and numbered case.

Milton S. Tyre, Attorney for Petitioner, by Rose S. Rosenberg.

[fol. 265] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS—Filed January 5, 1951

The Petitioner, David Hyun, hereby files his Traverse to the Return to the Writ of Habeas Corpus, which Return is dated January 4, 1951 and was served upon Petitioner's counsel on that date, and alleges, admits and denies as follows:

I

Answering Paragraphs VI, VII, VIII, X, XII and XIII, he alleges that he has no sufficient information or belief concerning the allegations contained therein, and on that ground denies generally and specifically each, every and all of the allegations contained therein; particularly he denies that if enlarged on bail he would engage in activities prejudicial to the public interest or which would endanger the welfare or safety of the United States; further he particularly denies that the Respondent or the Acting Commissioner is in the possession of any facts which would lead either of them reasonably to conclude the Petitioner would engage in such activities if enlarged on bail.

[fols. 266-268] II

Answering Paragraph I thereof denies generally and specifically each every and all of the allegations contained therein and the whole thereof.

III

Petitioner realleges herein each, every and all of the allegations and statements of fact contained in the Petition for Writ of Habeas Corpus on file herein as though they were set forth in full hereat, and by this reference incorporates the same as a part hereof.

Wherefore, Petitioner prays that he be forthwith ordered discharged and released from custody under bond with such conditions as to the Court may seem proper in the premises, and for such other and further relief as may seem proper to the Court in the premises.

David Hyun, Petitioner.

Duly sworn to by David Hyun. Jurat omitted in printing.

[fols. 269-270] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

SUPPLEMENTAL RETURN TO WRIT OF HABEAS CORPUS—Filed January 9, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, herewith supplement my Return to Writ of Habeas Corpus in the above entitled matter, and in answer to petitioner's Traverse thereto filed deny and allege as follows:

I

In answer to paragraph III of said Traverse which incorporates by reference the petition recently filed by petitioner and more specifically paragraphs VII, VIII and IX, respondent has no information and belief as to the allegations therein contained and therefore denies all of the allegations therein contained, and respondent alleges that petitioner has since 1945 been an active member of the Communist Party in whatever locality he was residing.

Wherefore, I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

Herman R. Landon, District Director, Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Dated: January 8, 1951.

[fol. 271] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In the Matter of DAVID HYUN, Petitioner for Writ of Habeas Corpus

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 22, 1951

The above matter having come on for hearing upon the writ of habeas corpus on the 9th day of January 1951, at 2:00 P.M., and on the 11th day of January 1951 at 2:00 P.M., before the Honorable Ben Harrison, Judge presiding, Milton S. Tyre appearing as attorney for petitioner, and Ernest A. Tolin, United States Attorney by Walter S. Binns, Chief Assistant, appearing as attorneys for respondent Herman R. Landon, District Director of Immigration and Naturalization Service, and said respondent having filed his Return and Supplemental Return to the Writ of Habeas Corpus, and petitioner having filed his Traverse to said Return, and the Court having heard oral argument and considered the Affidavit filed by respondent together with the Return, and having taken evidence as to the progress of the deportation hearings being considered before a hearing officer of the Immigration and Naturalization Service, and petitioner not desiring to submit evidence, the Court makes its findings of fact and conclusions of law.

FINDINGS OF FACT

I.

That David Hyun is an alien who was born at Seoul, Korea, on January 3, 1917, and entered the United States as a citizen of China.

[fol. 272]

II

That the petitioner was taken into custody on a warrant of arrest issued by authority of the Attorney General on July 25, 1949, and was released from custody on a bond in the sum of $2,000.00.

III

That, after a hearing on said warrant of arrest, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung* v. *McGrath*, 339 U.S. 33.

IV

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings.

V

That on October 6, 1950, the respondent submitted to the Acting Commissioner a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens who were currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party. Petitioner's case was among the eleven active members so reported.

VI

That on October 21, 1950, the respondent received a radiogram from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., directing him to apprehend and detain petitioner David Hyun among others. Thereafter petitioner was re-arrested.

VII

That on October 31, 1950, a new warrant of arrest was issued by authority of the Attorney General charging that petitioner was subject to deportation as a person who had

been, after entry into the United States, a member of the Communist Party. That pursuant to said instructions from the Attorney General, deportation hearings in petitioner's [fol. 273] case were held on November 22, 1950, and continued for the purpose of procuring depositions from witnesses in Hawaii at the request of the Government. Said depositions have been taken.

VIII

That the Acting Commissioner of Immigration was in possession of evidence that said petitioner was a member of the Communist Party of the United States, as was set forth in the Affidavit filed with the Return, as follows:

"That with respect to David Hyun, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party and has actively participated in its program; more specifically, that said petitioner was a member of the Communist Party in the Territory of Hawaii and was instrumental in reactivating the Communist Party in Hawaii in 1945; that he was a member of the Executive Board of the Communist Party in Hawaii in 1946; that he led and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the Communist Party during the years 1946 and 1947; that he advocated re-distribution of wealth and Government ownership of industry, such as exists in Russia, and that these reforms would take place following the revolution in the United States; that said petitioner was instrumental in forming a branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); and that he was educational director of the Westlake Section of the Communist Party in Los Angeles, California, in 1949."

IX

The Court takes judicial notice that a state of emergency exists and that an undeclared war is being waged in Korea

between the Armed Forces of the United States and the armed forces of Communist China.

[fols. 274-275] CONCLUSIONS OF LAW

I

The Attorney General, through the Immigration and Naturalization Service, has exercised discretion in determining that petitioner David Hyun be retained in custody pending deportation.

II

The retention of David Hyun in custody pending deportation was not arbitrary or capricious.

III

There is substantial evidence to support the decision of the Attorney General, acting through the Immigration and Naturalization Service, to retain petitioner David Hyun in custody.

IV

Petitioner is not being illegally restrained by respondent but is in custody of respondent under proper and lawful order.

V

The Writ of Habeas Corpus is and should be discharged and dismissed.

Dated: January 22, 1951.

Ben Harrison, United States District Judge.

Approved as to form: Milton S. Tyre, Attorney for Petitioner.

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In the Matter of DAVID HYUN, Petitioner for Writ of Habeas Corpus

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT—January 22, 1951

The mandate of the Circuit Court of Appeals for the Ninth Circuit was spread in the District Court on December 27, 1950. The Court thereupon, in accordance with the mandate, ordered the issuance of writ of Habeas Corpus directed to Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, and set January 5, 1951 as the return date on the said writ. On said date the Court set the matter for hearing on January 9, 1951, the petitioner being represented by his counsel Milton S. Tyre, and the respondent by his counsel Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns, Chief Assistant United States Attorney, and the Court having read the Return and the Traverse on file and the Supplemental Return, and having read and considered the Affidavit filed by respondent in addition to the Return and heard arguments, and further proceedings being had January 11, 1951, and the Court having taken evidence as to the progress of the deportation hearing against David Hyun before a hearing officer of the Immigration and Naturalization Service;

And the petitioner personally and by his attorney not desiring to submit evidence;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed and the [fols. 277-278] Writ of Habeas Corpus issued herein be and hereby is discharged, and the petitioner is remanded to the custody of the Immigration and Naturalization Service of the Department of Justice.

Dated: January 22, 1951.

Ben Harrison, United States District Judge.

Approved as to form: Milton S. Tyre, Attorney for Petitioner.

[fols. 279-280] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b) —Filed January 24, 1951

Notice is hereby given that David Hyun, appellant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the Order discharging the Writ of Habeas Corpus entered in this action on January 22, 1951.

Milton S. Tyre, Attorney for Appellant David Hyun, 650 South Grand Avenue, Los Angeles 17, California.

[fol. 281] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

[Title omitted]

STIPULATION DESIGNATING RECORD ON APPEAL—Filed January 25, 1951

It is hereby stipulated by and between the Appellant David Hyun and H. R. Landon, Respondent, through their respective counsel, that the Record on Appeal in the above entitled matter and the papers designated to be included in the Clerk's Transcript on Appeal shall consist of the following:

1. Petition for Writ of Habeas Corpus verified under the date of November 3, 1950.

2. Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted, dated November 3, 1950.

[fols. 282-283] 3. Return to Order to Show Cause Why Writ Should Not be Granted, verified on November 6, 1950.

4. Traverse to Return to Order to Show Cause Why Writ Should Not Be Granted, verified on November 6, 1950.

5. Return to Writ of Habeas Corpus together with affi-

dayits and documents attached thereto, which return was verified by Herman R. Landon under the date of January 4, 1951.

6. Supplemental Return to Writ of Habeas Corpus signed by Herman R. Landon, dated January ——, 1951.

7. Traverse to Return to Writ of Habeas Corpus dated January 4, 1951, which traverse was verified by David Hyun under the date of January 5, 1951.

8. Reporter's Transcript of all proceedings in the above matter since January 2, 1951.

9. Findings of Fact and Conclusions of Law dated January 22, 1951.

10. Order dismissing Petition for Writ of Habeas Corpus entered January 22, 1951.

11. This Stipulation Designating Record on Appeal.

12. Notice of Appeal to the Court of Appeals.

Dated: January 25, 1951.

Milton S. Tyre, Attorney for Appellant David Hyun;
Ernest A. Tolin, United States Attorney, by Walter S. Binns, Attorney for Respondent, H. R. Landon.

[fols. 284-285] Clerk's Certificate to foregoing transcript omitted in printing.

[Endorsed:] Filed Jan. 28, 1951. Paul P. O'Brien, Clerk.

[fol. 286] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER OF SUBMISSION—December 1, 1950

Ordered (1) motions for bail pending appeal (2) that causes be heard on typewritten transcript of record and typewritten briefs, and (3) cause on merits, argued by Mr. John W. Porter, counsel for appellant Carlson, and by Mrs. Rose S. Rosenberg, counsel for appellant Stevenson, and by Mr. John Coughlan, counsel for appellants Mangaoang and Sasieff, and by Messrs. Walter Binns and John E. Bel-

cher, Assistants United States Attorney, and by Mr. John P. Boyd, Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for consideration and decision, counsel for respective parties to file further briefs in five days.

[fol. 287] Before Stephens, Healy and Bone, Circuit Judges

ORDER DIRECTING ENTRY OF JUDGMENT—December 16, 1950

Pursuant to the order this day filed, it is ordered that a judgment be filed and recorded in each of above causes in accordance with the opinion rendered in the companion cause of Frank Carlson vs. Landon, etc., No. 12742; opinion in these causes to follow:

[fol. 288] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12744

DAVID HYUN, Appellant,

vs.

HERMAN R. LANDON, etc., Appellee

JUDGMENT—December 16, 1950

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and this cause be, and hereby is remanded to the said District Court with directions to the said District Court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be of-

fered and received, all in conformity with the opinion of this court in Case No. 12742.

[fol. 289] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges.

ORDER DIRECTING FILING OF OPINION—December 20, 1950.

Ordered that the typewritten opinion this day rendered by this Court in above causes be forthwith filed by the Clerk.

[fol. 290] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,743

MIRIAM CHRISTINE STEVENSON, formerly Burroughs, nee Kenkel, alias Miki Ashton, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,744

DAVID HYUN, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,745

Dec. 20, 1950

HARRY CARLISLE, also known as Harry Carlyle, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

OPINION—December 20, 1950

Appeal from the United States District Court for the Southern District of California, Central Division

Before Stephens, Healy and Bone, Circuit Judges

STEPHENS, Circuit Judge

The appeals in the above entitled cases were decided and order entered on the 16th day of December, 1950, coincident with the decision and order in a like proceeding entitled [fol. 291] *Carlson v. Landon*, No. 12,742. We noted in our memorandum, filed on the same date, that opinion in each case would follow. We combine the three in one opinion.

The facts in each of the instant cases very largely parallel those set out in the *Carlson* case. The dates of the essential facts are not exactly the same in either case, but the variation of events and the dates of their happening are not great enough to make any particular difference. The applicable law, the principles applied and the reasoning and authority relied upon and set out in the *Carlson* case rule these cases and therefore we make specific reference thereto without repetition herein. The following alleged facts, undenied in the pleadings, are set out under the names of the three petitioners. Details as to each petitioner are set out in the petitions and we state their essence very briefly:

STEVENSON

Petitioner Stevenson was born in England in 1919. At the age of 12 years she was taken to Canada with her family. She entered the United States in 1923 and since has resided in Los Angeles, California. With her mother she visited Canada in 1928 for a few hours and later in the same year she went to Mexico for a few hours where she was married to a United States citizen. In 1929 she made inquiry of the Immigration and Naturalization Service as to applying for citizenship but her legal entrance into this country was questioned.

HYUN

The petition for Hyun sets out a seemingly long period of limited restraint under a bail bond given under an arrest for deportation prior to the amendment to the Immigration laws by the Internal Security Act of 1950, and complete restraint without bail since October 21, 1950, under an arrest for deportation pursuant to such amendment.

Petitioner Hyun was born in Seoul, Korea; is 33 years of age; was taken to Hawaii at an early age and resided there until December, 1947. His schooling resulted in a bachelor of science degree. In school he appears to have been a leader in social and religious activities. Although disqualified for military service during the late war because of his status as an alien, he became Captain of Reserve Officers [fols. 292-321] Training Corps at the University of Hawaii. He has applied for citizenship; is married and has two minor sons. He has resided in Los Angeles, California, since December, 1947, and has engaged in a useful occupation. Petitioner's petition is replete with a detailed account

of his life. He denies that his release would be detrimental to the United States in any manner.

CARLISLE

The petitioner Carlisle was born in England in 1897 and has resided in Los Angeles, California, for the past 15 years.

The orders in these cases dated December 16, 1950, are alike and are the same as in *Carlson v. Landon*, No. 12,742, 9 Cir., . . F.2d . . . The text of the orders is repeated, to-wit:

The judgment is reversed and the cause is remanded with direction to the district court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with this opinion.

Reversed and remanded.

[Endorsed:] Opinion Filed Dec. 20, 1950. Paul P. O'Brien, Clerk.

[fol. 322] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 12503-Y

In re HARRY CARLISLE, ALSO KNOWN AS HARRY CARLYLE

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 3, 1950

Comes now Harry Carlisle, also known as Harry Carlyle, by Stanley Fleishman, his attorney, and petitions this Honorable Court for a Writ of Habeas Corpus directing Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, District No. 16, to produce the said Harry Carlisle before this Court on a date and at a time to be set by this Court, and then and there to show cause why the said Harry Carlisle should not be released from custody

upon his bond; and in support thereof your petitioner alleges as follows:

I

That this verification is made by Stanley Fleishman rather than by the petitioner Harry Carlisle, personally, because the petitioner is in custody at Terminal Island, which makes it very difficult to have this petition signed personally, and the questions involved are questions of law.

II

On or about June 13, 1950, the Attorney General of the United States caused to be issued, and on or about June 16, 1950, to be served upon said Harry Carlisle, a warrant for his arrest, charging in substance that said Harry Car- [fol. 323] lisle was an alien found to be in the United States in violation of the immigration laws thereof, in that he was after entry an alien who is a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States, in violation of the Act of October 16, 1918.

III

That said warrant on its face authorized the release of said Harry Carlisle under bond in the sum of $5,000.00, and that following his said arrest under such warrant said Harry Carlisle was released upon posting bond in such amount.

IV

That at all times since on or about June 19, 1950 up to and including October 21, 1950, said Harry Carlisle was at liberty under such bond.

V

That in response to a demand for a bill of particulars made by petitioner as counsel for Harry Carlisle, Albert Del Guercio, Acting District Director of the Immigration and Naturalization Service wrote in a letter dated August 31, 1950:

"the respondent is alleged to have been a member of the Communist Party of the United States from 1933 to 1936, inclusive."

[fol. 324]

VI

That on July 6, 1950 said Harry Carlisle was advised to appear on July 26, 1950 for a hearing to show cause why he should not be deported from the United States; and on the said date Harry Carlisle did in fact appear for said hearing which was presided over by Hearing Examiner Burt F. Kearney.

VII

That thereafter and on July 28, 1950, Harry Carlisle was requested to appear for a hearing on September 29, 1950 and October 3, 1950.

VIII

That on September 26, 1950, Harry Carlisle was advised that the hearings scheduled for September 29, 1950 and October 3, 1950 had been temporarily placed off calendar and that he need not appear as previously directed; Harry Carlisle was also advised on September 26, 1950 that he would be informed of the time and place of hearing when a new date was set.

IX

That no new date has been set for a hearing to enable Harry Carlisle to show cause why he should not be deported from the United States.

X

That at all times since on or about June 16, 1950, to date, Harry Carlisle has been available, ready and willing to attend at such hearing or any other lawful proceeding under said warrant of arrest.

[fol. 325]

XI

That on or about July 13, 1950 James E. Riley, Acting Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service, wrote J. Allan Frankel, the then attorney for Harry Carlisle, regarding the $5,000.00 bail imposed and said:

"Careful consideration is given in each case to all the relevant factors before the amount of bond is set. In the instant case, it was concluded that $5,000.00 bail was appropriate. I can see no reason to alter that conclusion."

XII

That Harry Carlisle was born in London, England on December 23, 1897; he last arrived in the United States at Detroit, Michigan on or about June 18, 1920; that at all times since his said entry into the United States, Harry Carlisle has been and now is a resident of the United States and has made and maintained his home here.

XIII

That continuously for the last fifteen (15) years Harry Carlisle has been a resident of the State of California in the County of Los Angeles.

XIV

That on Saturday, October 21, 1950, at approximately midnight, Harry Carlisle was arrested by agents of the District Director of the Immigration and Naturalization [fol. 326] Service at Los Angeles, taken into custody and lodged in the County Jail of Los Angeles County. That at the time of said arrest Harry Carlisle was informed by said agents that bond of $5,000.00 under which he had been at liberty since on or about June 19, 1950 had been revoked.

XV

That on October 24, 1950 Harry Carlisle filed a petition for a Writ of Habeas Corpus alleging that he was arrested and was being detained without warrant and without authority in law. Said petition was entitled Matter of Harry Carlisle, for Write of Habeas Corpus, No. 12451-HB.

XVI

That on October 24, 1950 the Honorable Judge Leon R. Yankwich signed an Order to Show Cause ordering H. R. Landon to show cause on October 30, 1950 why Harry Carlisle should not be restored to his liberty on his bond of $5,000.00.

XVII

That on October 30 and October 31, 1950 the hearing to show cause was heard before the Honorable Ben Harrison.

XVIII

That on October 31, 1950 H. R. Landon, District Director of the Immigration and Naturalization Service issued a new warrant for the arrest of Harry Carlisle charging that

"he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: an alien who was a member of the Communist Party of the United States."

[fol. 327]

XIX

That said new warrant further provided as follows:

"Pending determination of deportability the alien named is to be continued in custody. This warrant supersedes that issued on the 13th day of June, 1950".

XX

The said warrant of October 31, 1950 was served on petitioner Harry Carlisle while he was still in custody of H. R. Landon, District Director of Immigration and Naturalization Service, under the warrant issued on June 13, 1950, and while his petition for a Writ of Habeas Corpus was not yet passed upon by the Honorable Ben Harrison.

XXI

On November 1, 1950, petitioner Harry Carlisle in case No. 12451-BH asked that the said petition be dismissed for the reason that a new warrant was served after the original proceeding had been filed.

XXII

On November 3, 1950 Stanley Fleishman, attorney for the petitioner Harry Carlisle, received from the Clerk of the above entitled Court a Notice of Entry of Judgment in the Matter of Harry Carlisle for Writ of Habeas Corpus No. 12451-BH, stating:

"You are hereby notified that Dismissal has been entered this day in the above entitled case in Judgment Book 68, page 776. Dated at Los Angeles, California, [fol. 328] November 2, 1950".

XXIII

Your petitioner is informed and believes and on the basis of such information and belief alleges that it is the intention of said District Director to hold Harry Carlisle indefinitely and until the final determination of his deportability under said warrant of arrest, dated October 31, 1950.

XXIV

That in causing the arrest and detention of said Harry Carlisle under the circumstances hereinabove set forth, said District Director acted as agent and representative of the Attorney General of the United States; that such arrest and detention under such circumstances constituted an abuse of the discretion vested in the Attorney General by Section 20 of the Immigration Act of February 5, 1917 as amended (57 Stat. 553) in the following, among other respects:

(a) That said Harry Carlisle at all times herein mentioned has been, now is and will continue to be available to appear and will appear at any and all hearings or other lawful proceedings in connection with the determination of his deportabiiity;

(b) That said Harry Carlisle at all times herein mentioned has been and now is a law-abiding resident of the City of Los Angeles with his home and family here and with all of his interests and activities centered in and around the City of Los Angeles;

[fol. 329] (c) That by virtue of the grant by the Supreme Court of the United States on October 23, 1950 of a petition for Writ of Certiorari in the case of United States v. Dennis, et al. for the express purpose of reviewing the constitutionality of the Statute known as the Smith Act of 1940 (54 Stat. 670, 671), the deportability of said Harry Carlisle under said Act is placed in serious doubt and the validity of the charges against him as alleged above is placed in question;

(d) That the Internal Security Act of 1950, under which the new warrant of October 31, 1950 was issued, is unconstitutional;

(e) That said Harry Carlisle is not charged with anything other than having been a member of the Communist Party of the United States from 1933 to 1936 inclusive;

(f) That all of the relevant factors were duly considered at the time that Harry Carlisle's bail was set in the sum of $5,000.00; at that time bail in the sum of $5,000.00 was considered appropriate. That all the relevant factors are the same now as they were when Harry Carlisle was set free on bail in the sum of $5,000.00 in June of 1950.

XXV

That the action of the said District Director in arresting and detaining said Harry Carlisle as aforesaid constituted a denial of due process of law to said Harry Carlisle in the [fol. 330] following among other respects:

(a) That the deportation proceedings against Carlisle are in their initial stages and there has not yet been a formal hearing held in the case. The proceedings are likely to continue for many months and his detention without bail throughout such proceedings will deprive him of his liberty arbitrarily and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

(b) That the said Harry Carlisle was arrested and is being detained without bail because of his political beliefs and activities.

(c) That Harry Carlisle is being detained without bail allegedly under authority of the Internal Security Act for acts he allegedly performed prior to its enactment.

XXVI

That the detention of said Carlisle without bond as aforesaid constitutes a denial of bail in violation of the Eighth Amendment to the Constitution of the United States, and under the circumstances hereinbefore alleged further constitutes cruel and unusual punishment in violation of the Eighth Amendment thereto.

XXVII

That Section 20 of the Immigration Act of February 5, 1917, as amended by Section 23 of Public Law 831, 81st Congress (commonly known as Subversive Activities Con-[fol. 331] trol Act of 1950) is unconstitutional and void in that it deprives persons, including said Harry Carlisle, of

liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, in that it abridges the freedom of persons, including said Harry Carlisle, of speech, the press and assembly and the right to petition the government for redress of grievances, and in that it purports to authorize indefinite detention of persons including said Carlisle without bond.

XXVIII

That by virtue of the facts and circumstances hereinabove set forth, said Harry Carlisle is unlawfully imprisoned, detained and restrained of his liberty by H. R. Landon, District Director, Immigration and Naturalization Service, and that said imprisonment, detention, confinement and restraint are illegal, arbitrary and unwarranted, as hereinabove alleged.

XXIX

That a previous application for a Writ of Habeas Corpus has been dismissed as hereinabove set forth.

Wherefore, petitioner prays that a Writ of Habeas Corpus may be granted directed to H. R. Landon, District Director, Immigration and Naturalization Service, and his deputies, and to any Sheriff, Marshal, Constable, or other peace officer having custody of the body of the said Harry Carlisle, commanding him to have the body of said Har
[fol. 332] Carlisle before this Court at a time and place to be specified, to do and receive what shall then and there be considered concerning the said Harry Carlisle together with the time and cause of his detention, and said Writ; and that the said Harry Carlisle may be restored to his liberty on his bond of $5,000.00.

Dated this 3rd day of November, 1950.

(S.) Stanley Fleishman.

Duly sworn to by Stanley Fleishman. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 333] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS—Filed November 7, 1950

Pursuant to agreement entered into between Walter S. Binns, Chief Assistant United States Attorney and Stanley Fleishman, Attorney for Petitioner, this supplemental petition is filed by Harry Carlisle and respectfully states:

I

Petitioner Harry Carlisle has never been informed by the Attorney General or his deputies or anyone else:

A. What activities it is believed he would engage in if enlarged on bail.

B. In what way it is claimed said activities would be prejudicial to the public interest.

C. In what way it is claimed said activities would endanger the welfare and safety of the United States.

(S.) Stanley Fleishman, Attorney for Petitioner.

Duly sworn to by Stanley Fleishman. Jurat omitted in printing.

[fol. 334] [File endorsement omitted.]

[fol. 335] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS—January 2, 1951

The President of the United States of America to H. R. Landon, District Director of the Immigration and Naturalization Service, Los Angeles, California, Greeting:

You are hereby commanded, that the body of Harry Carlisle, also known as Harry Carlyle, by you restrained of his liberty, as it is said detained by whatsoever names the said Harry Carlisle, also known as Harry Carlyle, may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Ben Harrison, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles at 10:00

o'clock a.m., on the 5th day of January, 1951, then and thereto do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf, and have you then and there this writ.

Witness the Honorable Ben Harrison, United States District Judge at Los Angeles, California, this 2nd day of January, A. D. 1951.

Edmund L. Smith, Clerk. By (S.) Murray E. Wire, Deputy Clerk. (Seal.)

[fol. 336] United States Marshal's Return

So. District of Calif., ss:

Received the within writ the 3 day of Jan., 1951, and executed same. Serving H. R. Landon by leaving Writ with Mr. H. R. Field, Room #651, Fed. Bldg. L. A.

James J. Boyle, U. S. Marshal. By (S.) Travis F. Oltman, Deputy Marshal.

Marshal's Fee $2.00.

[Endorsed:] Filed January 5, 1951. Edmund L. Smith, Clerk, by (S.) G. A. Saunders, Deputy Clerk.

[fol. 337] In United States District Court.

Return to Writ of Habeas Corpus—Filed January 4, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, as and for my return to writ of habeas corpus in the above entitled case, respectfully state:

I

That Harry Carlisle, also known as Harry Carlyle, hereafter referred to as the petitioner, is not being illegally restrained by respondent of his liberty, but is in respondent's custody under proper and lawful authority.

II

That the said petitioner is a native and subject of Great Britain, born at London, England, on or about September 23, 1897.

III

That a warrant for the said petitioner's arrest was issued by authority of the Attorney General on June 13, 1950, charging that he was subject to deportation under the Act of October 16, 1918, as amended (8 USC 137), a certified copy of which warrant of arrest is attached hereto as a part of this return and marked Exhibit "A".

IV

That the said petitioner was taken into custody on the aforesaid warrant of arrest on June 16, 1950, and on June 19, 1950, was released from custody on a delivery bond in [fol. 338] the sum of $5,000.

V

That, after a hearing on said warrant of arrest, to give said petitioner an opportunity to show cause why he should not be deported, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of Sung v. McGrath, 339 U.S. 33.

VI

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Naturalization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings on charges under the Act of October 16, 1918, as amended (8 USC 137).

VII

That on October 6, 1950, the District Director of Immigration and Naturalization, Los Angeles, California, submitted to the Acting Commissioner of Immigration and Naturalization, Washington, D. C., a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the [fol. 339] Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all

of whom were the subjects of pending deportation proceedings under the Act of October 16, 1918, as amended (8 USC 137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

VIII

That on October 21, 1950, the following instructions were received by the District Director of Immigration and Naturalization, Los Angeles, California, by radio from the Acting Commissioner of Immigration and Naturalization, Washington, D. C.:

> "Apprehend immediately and detain the following aliens pursuant to Section Twenty of Nineteen Seventeen Act as amended by Internal Security Act: David Hyun and Harry Carlisle and Solomon Sokolnick. Also apprehend and detain all active Communists under proceedings in your district unless detention would result in severe hardship because of individual's physical condition or family situation. Give priority to those named."

IX

That pursuant to the aforesaid instructions the petitioner was taken into custody on October 21, 1950, on the aforesaid [fol. 340] warrant of arrest issued on June 13, 1950.

X

That on October 27, 1950, the following radiogram was received by the District Director of Immigration and Naturalization, Los Angeles, California, from the Acting Commissioner of Immigration and Naturalization, at Washington, D. C.:

> "For your information and that of United States attorneys and aliens and their attorneys the Instruction to you of October Twenty First to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likeli-

hood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued detention might impose stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by Section Nine Zero Point One of Title Eight CFR paren Twelve FR Five Zero Seven Two July Thirty One Nineteen Forty Seven paren under Section Thirty Seven of the Alien Registration Act of Nineteen Forty comma Eight USC Four Five Eight".

[fol. 341]

XI

That on October 31, 1950, while the said petitioner continued in custody under the warrant of arrest issued on June 13, 1950, a new warrant of arrest was issued by authority of the Attorney General charging that he was subject to deportation under the Act of October 16, 1918 (8 USC 137), as amended by the Internal Security Act of 1950, and served upon the said petitioner, which said warrant of arrest of October 31, 1950, superseded the said warrant of arrest issued on June 13, 1950, a copy of which said warrant of arrest of October 31, 1950, is attached hereto as a part of this return and marked Exhibit "C".

XII

That pursuant to outstanding instructions from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., the case of petitioner, as other deportation cases under the Act of October 16, 1918, as amended (8 USC 137), has been given first priority in expediting hearing, to the end that the said case may be disposed of as speedily as possible, but delay has been encountered from counsel for the petitioner, as recited in more detail in respondent's affidavit which is attached hereto as a part of this return and marked Exhibit "B".

XIII

That the Acting Commissioner of Immigration and Naturalization, Washington, D. C., acting for the Attorney General, has exercised the grant of statutory discretion in

[fol. 342] Section 20 of the Immigration Act of 1917 (8 USC 156), as amended by the Internal Security Act of 1950, to take the said petitioner into custody and to continue him in custody without bond pending final determination of his deportability, and in exercising said discretion to detain the said petitioner without bond the Acting Commissioner of Immigration and Naturalization, Washington, D. C., has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program of the Communist Party, the central purpose of which is to subvert the existing Government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship committed to the destruction of individual liberty and private property; and that, moreover, said facts cause the said Acting Commissioner to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States—which findings the said Acting Commissioner has communicated to respondent on the basis of facts which the respondent has communicated to the said Acting Commissioner, tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party, as recited herein. [fol. 343] Wherefore, I, Herman R. Landon, District Director, Immigration and Naturalization Service, United States Department of Justice, pray that the writ of habeas corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service, United States Department of Justice, District No. 16.

[fol. 344] EXHIBIT "A" TO RETURN

Warrant for Arrest of Alien, United States of America, Department of Justice

Los Angeles, Calif.

CO A5 542 165.
No. 1600-22413.

To District Enforcement Officer, Los Angeles, California or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Harry Carlisle aka Harry Carlyle aka Stephen Peacock aka Harry Hoffman who entered this country at Detroit, Michigan by International Ferry on the 18th day of June, 1920 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, and group that advises, advocates and teaches the overthrow, by force and violence, of the Government of the United States.

The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class, set forth in [fol. 345] Section 1 of said Act: An alien who is a member of an organization, society, and group that writes, circulates, distributes, prints, publishes, and displays any written and printed matter advising, advocating, and teaching the overthrow, by force and violence, of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Nat-

uralization Service, 1950." Authority has been granted to release under bond in the sum of $5000, the alien named.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 13th day of June, 1950.

(S.) Albert Del Guercio, Acting District Director.

[fol. 346] EXHIBIT "B" TO RETURN

IN THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

STATE OF CALIFORNIA
County of Los Angeles, ss:

Comes now Herman R. Landon, respondent herein, who states and deposes, as follows:

I. That he is District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said district.

II. That with respect to Harry Carlisle, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that in 1932 petitioner stated that he was in favor of the overthrow of the Government of the United States and would go to any means to attain that end; that petitioner was a speaker at closed meetings of Communist Party functionaries in 1933; that in 1935 said petitioner was editor of the "Western Worker" (the then official Western organ of the Communist Party, U.S.A., Section of the Communist International); in 1937 said petitioner was a member of the League of American Writers (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); that in 1949 said peti-
[fol. 347] tioner was reported in the Press as speaker on Communist Party topics and activities; in 1949 said petitioner was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F.R. 315, No. 231); that in August, 1950, the said petitioner was a speaker at a meeting of the Civil Rights Congress in Los Angeles (an organization desig-

nated by the Attorney General as Communist, F.R. 315, No. 231); that at hearings held in connection with deportation proceedings, the petitioner refused to answer questions regarding his membership in the Communist Party on the ground of self-incrimination.

III. That the Service records show with respect to petitioner's hearings under Service Warrant of Arrest (Government's Exhibit "C"), the case was first set for hearing on November 22, 1950 and upon motion of petitioner's counsel was continued to November 28, 1950. On that date, the case was again continued to December 13, 1950 on motion of petitioner's counsel. On the latter date, it was again continued on motion of petitioner's counsel.

(S.) Herman R. Landon.

Subscribed and sworn to before me this 4th day of January, 1951. Edmund L. Smith, Clerk U. S. District Court, by (S.) Michael F. Leone, Deputy Clerk. (Seal)

[fol. 348] EXHIBIT "C" TO RETURN

Warrant for Arrest of Alien

United States of America

Department of Justice

Los Angeles, California

Copy

1600-22413
No. A-5542165

To District Enforcement Officer, Los Angeles, California or to any Immigrant Inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Harry Carlisle aka Harry Carlyle aka Stephen Peacock aka Harry Hoffman who entered this country at Detroit, Michigan by International Ferry on the 18th day of June, 1920 has been found in the United States in violation of the immigration laws thereof, and is subject to be

taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act: An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, here-[fol. 349] under, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 13th day of June, 1950.

For so doing, this shall be your sufficient warrant.
Witness my hand and seal this 31st day of October, 1950.

(S.) H. R. Landon, District Director.

[fol. 350] *Duly sworn to by Herman R. Landon. Jurat omitted in printing.*

[fol. 351] (Title of District Court and Cause)

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged this 4 day of January, 1951, of a copy of the Return to Writ of Habeas Corpus, in the above-entitled and numbered case.

Stanley Fleishman, Attorney for Petitioner. By Stanley Fleishman, By Rose S. Rosenberg.

[File endorsement omitted.]

[fol. 352] IN UNITED STATES DISTRICT COURT

DEMURRER AND TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS—Filed January 5, 1951

Comes now Harry Carlisle by Stanley Fleishman his attorney and demurs to and traverses the Return to Show Cause Why Writ Should Not be Granted herein, as follows:

A

By way of demurrer to the Return on file herein, petitioner alleges:

I

That the facts stated in the Return are insufficient to justify the restraint of petitioner Harry Carlisle.

II

Paragraph XIII of the Return is uncertain in the following particulars:

(a) It cannot be ascertained from the Return upon what facts, if any, the Attorney General exercised his discretion to deny petitioner Harry Carlisle bail.

(b) It cannot be ascertained from the Return what activities it is believed Harry Carlisle would engage in if enlarged on bail.

(c) It cannot be ascertained from the Return where he would engage in said activities if enlarged on bail.

(d) It cannot be ascertained from the Return with whom he would engage in said activities if enlarged on bail.

(e) It cannot be ascertained from the Return when he [fol. 353] would engage in said activities if enlarged on bail.

(f) It cannot be ascertained from the Return in what way said activities would be prejudicial to the public interest.

(g) It cannot be ascertained from the Return in what way said activities would endanger the welfare and safety of the United States.

III

The Return is unintelligible in the same respects in which it is alleged herein above that it is uncertain.

IV

The Return is ambiguous in the same respects in which it is alleged herein above that it is uncertain.

B

By way of traverse to the Return on file herein, petitioner Harry Carlisle admits, denies and alleges as follows:

I

That each and every allegation of the petitioner Harry Carlisle's Petition and his Supplemental Petition for a Writ of Habeas Corpus is herein incorporated by reference as though each and every paragraph therein were fully set forth herein.

II

That the deportation proceedings in this case will take in excess of six months to conclude since the proceedings require not only hearings before a hearing officer but also require recommendations and allow for appeal to the Board [fol. 354] of Immigration Appeals. In addition, the petitioner of course has the right to a judicial review of any adverse order which may be rendered.

Wherefore petitioner Harry Carlisle prays:

1. That the Demurrer to the Return be granted.
2. That a Writ of Habeas Corpus be granted and that petitioner Harry Carlisle be restored to his liberty on the bond of $5,000.00.

(S.)Stanley Fleishman, Attorney for Petitioner.

Duly sworn to by Stanley Fleishman. Jurat omitted in printing.

[fol. 355] Received copy of the within Traverse this 5 day of Jan, 1951.

Ernest A. Tolin, U. S. Atty., By —, Attorney for Respondent.

Received copy of the within Traverse this 5 day of Jan. 1951.

(S.) Walter S. Binns, Attorney for —

[File endorsement omitted.]

[fol. 356] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL RETURN TO WRIT OF HABEAS CORPUS—Filed January 9, 1951

I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, respondent herein, herewith supplement my return to Writ of Habeas Corpus in the above entitled matter, and in answer to petitioner's Traverse thereto filed deny and allege as follows:

I

In answer to paragraph I of said Traverse which incorporates the petition and supplemental petition heretofore filed by petitioner, and paragraphs XII and XIII thereof, respondent has no information and belief as to the truth of the allegations therein contained and therefore denies the allegations contained therein.

II

In answer to paragraph XXIV, respondent denies that Harry Carlisle has been a law-abiding resident of the City of Los Angeles, State of California, and alleges that during all of his residence in the City of Los Angeles, State of California, the said Harry Carlisle has been a member of the Communist Party; and further alleges that said membership in the Communist Party was not limited to the year 1933 through 1936.

III

In answer to paragraph XXV respondent denies that the [fol. 357] present pending deportation proceedings will continue for many months and alleges that they will proceed with expedition and dispatch if the respondent will cooperate by consenting to the holding of the hearings.

Wherefore, I, Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, pray that the Writ of Habeas Corpus be dismissed.

(S.) Herman R. Landon, District Director Immigration & Naturalization Service, United States Department of Justice, District No. 16.

Dated: January 8, 1951.

[File endorsement omitted.]

[fol. 358] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 22, 1951

The above matter having come on for hearing upon the writ of habeas corpus on the 9th day of January 1951, at 2:00 P.M., and on the 11th day of January 1951, at 2:00 P.M., before the Honorable Ben Harrison, Judge presiding, Stanley Fleishman appearing as attorney for petitioner, and Ernest A. Tolin, United States Attorney, by Walter S. Binns, Chief Assistant, appearing as attorneys for respondent Herman R. Landon, District Director of Immigration and Naturalization Service, and said respondent having filed his Return and Supplemental Return to the Writ of Habeas Corpus, and petitioner having filed his Demurrer and Traverse to said Return, and the Court having heard oral argument and considered the Affidavit filed by respondent together wtih the Return, and having taken evidence as to the progress of the deportation hearings being considered before a hearing officer of the Immigration and Naturalization Service, and petitioner not desiring to submit evidence, the Court makes its findings of fact and conclusions of law.

FINDINGS OF FACT

I

That Harry Carlisle, also known as Harry Carlyle, is a native and subject of Great Britain, born at London, England, on September 23, 1897.

[fol. 359] II

That petitioner was taken into custody on June 16, 1950, on a warrant of arrest issued by authority of the Attorney General on June 13, 1950, and was released from custody on bond in the sum of $5,000.00.

III

That on September 26, 1950, the Acting Commissioner of Immigration and Naturalization, Washington, D. C., requested the District Director of Immigration and Natu-

ralization, Los Angeles, California, to submit a report covering all aliens in the Los Angeles District who were currently active members of the Communist Party and who were under deportation proceedings.

IV

That on October 6, 1950, the respondent submitted to the Acting Commissioner a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens who were currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party.

V

That on October 21, 1950, the respondent received a radiogram from the Acting Commissioner of Immigration and Naturalization, Washington, D. C., directing him to apprehend and detain petitioner Harry Carlisle, also known as Harry Carlyle, among others. Thereafter petitioner [fol. 360] was re-arrested.

VI

That on October 31, 1950, a new warrant of arrest was issued by authority of the Attorney General, charging that petitioner was subject to deportation as a person who had been, after entry into the United States, a member of the Communist Party; that pursuant to said instructions from the Attorney General a deportation hearing in petitioner's case was held on November 22, 1950, and said hearing was continued to November 28, 1950; on that date the case was again continued to December 13, 1950; on that date the hearing was continued again, all at the request of petitioner.

VII

That the Acting Commissioner was in possession of evidence that the said petitioner had been, and is, a member of the Communist Party of the United States, which evidence was set forth in the affidavit filed together with the Return, and is as follows:

"That with respect to Harry Carlisle, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Com-

munist Party of the United States and has actively participated in its program; more specifically, that in 1932 petitioner stated that he was in favor of the overthrow of the Government of the United States and would go to any means to attain that end; that peti- [fol. 361] tioner was a speaker at closed meetings of Communist Party functionaries in 1933; that in 1936 said petitioner was editor of the "Western Worker" (the then official Western organ of the Communist Party, U.S.A., Section of the Communist International); in 1937 said petitioner was a member of the League of American Writers (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that in 1949 said petitioner was reported in the Press as speaker on Communist Party topics and activities; in 1949 said petitioner was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F.R. 315, No. 231); that in August 1950, the said petitioner was a speaker at a meeting of the Civil Rights Congress in Los Angeles (an organization designated by the Attorney General as Communist, F. *E.* 315, No. 231); that at hearings held in connection with deportation proceedings, the petitioner refused to answer questions regarding his membership in the Communist Party on the ground of self-incrimination."

VIII

The Court takes judicial notice that a state of emergency exists and that an undeclared war is being waged in Korea between the Armed Forces of the United States and the [fol. 362] armed forces of Communist China.

Conclusions of Law

I

The Attorney General, through the Immigration and Naturalization Service, has exercised discretion in determining that petitioner Harry Carlisle, also known as Harry Carlyle, be retained in custody pending deportation.

II

The retention of Harry Carlisle, also known as Harry Carlyle, in custody pending deportation was not arbitrary or capricious.

III

There is substantial evidence to support the decision of the Attorney General, acting through the Immigration and Naturalization Service, to retain petitioner Harry Carlisle in custody.

IV

Petitioner is not being illegally restrained by respondent but is in custody of respondent under proper and lawful order.

V

The Writ of Habeas Corpus is and should be discharged and dismissed.

Dated: This 22 day of January, 1951.

(S.) Ben Harrison, United States District Judge.

[fol. 363] Approved as to form: Stanley Fleishman, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 364] In the United States District Court in and for the Southern District of California, Central Division

No. 12503-BH

In the Matter of Harry Carlisle, also known as Harry Carlyle, Petitioner for Writ of Habeas Corpus

Order Dismissing Petition for Writ of Habeas Corpus and Discharging Writ— January 22, 1951

The mandate of the Circuit Court of Appeals for the Ninth Circuit was spread in the District Court on December 27, 1950. The Court thereupon, in accordance with the mandate, ordered the issuance of a Writ of Habeas Corpus directed to Herman R. Landon, District Director of the Immigration and Naturalization Service, United States

Department of Justice, Los Angeles, California, and set January 5, 1951 as the return date on the said writ. On said date the Court set the matter for hearing on January 9, 1951, the petitioner being represented by his counsel Stanley Fleishman, and the respondent by his counsel Ernest A. Tolin, United States Attorney, appearing by Walter S. Binns, Chief Assistant United States Attorney, and the Court having read the Return and the Traverse on file and the Supplemental Return, and having read and considered the Affidavit filed by respondent in addition to the Return and heard arguments, and further proceedings being had January 11, 1951, and the Court having taken [fol. 365] evidence as to the progress of the deportation hearing against Harry Carlisle, also known as Harry Carlyle, before a hearing officer of the Immigration and Naturalization Service;

And the petitioner personally and by his attorney not desiring to submit evidence;

It is hereby ordered, adjudged and decreed that the petition for writ of habeas corpus herein is dismissed and the Writ of Habeas Corpus issued herein be and hereby is discharged, and the petitioner is remanded to the custody of the Immigration and Naturalization Service of the Department of Justice.

Dated: January 22, 1951.

(S.) Ben Harrison, United States District Judge.

Approved as to form: Stanley Fleishman, Attorney for Petitioner.

Judgment entered Jan. 22, 1951. Book 70, Page 384. Edmund L. Smith, Clerk, by (S.) Edw. F. Drew, Deputy.

[File endorsement omitted.]

[fol. 366] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 25, 1951

To the Clerk of the Above Entitled Court:

You will please take notice that the petitioner, Harry Carlisle, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Dismissing the Petition for a Writ of Habeas Corpus entered in the above entitled Court on January 22, 1951. The said appeal is on a question of law.

Dated: January 22, 1951.

(S.) Stanley Fleishman, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 367] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD ON APPEAL—Filed January 25, 1951

It is hereby stipulated by and between the undersigned counsel for the petitioner-appellant and for the respondent-appellee herein that the following documents and *appers* shall constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit herein:

1. The petition for writ of habeas corpus.
2. The supplemental petition for writ of habeas corpus.
3. The writ of habeas corpus issued herein on or about January 2, 1951.
4. The return to writ of habeas corpus of H. R. Landon, respondent herein, together with exhibits attached thereto, executed January 4, 1951.
5. The demurrer and traverse to the petition to the writ of habeas corpus dated January 5, 1951.
6. The supplemental return to writ of habeas corpus.
7. Reporter's transcript of all proceedings.
8. Order discharging writ and denying petition, entered January 22, 1951.

10. This stipulation as to Record on Appeal.
11. Findings of Fact and Conclusions of Law.

Dated: This 22 day of January, 1951.

(S.) Stanley Fleishman, Attorney for Petitioner-[fol. 368] Appellant; Ernest A. Tolin, United States Attorney. (S.) Walter S. Binns, Chief Assistant U. S. Attorney, Attorneys for Respondent-Appellee.

[File endorsement omitted.]

[fols. 369-370] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 371] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges

ORDER OF SUBMISSION—December 1, 1950

Ordered (1) motions for bail pending appeal (2) that causes be heard on typewritten transcript of record and typewritten briefs, and (3) cause on merits, argued by Mr. John W. Porter, counsel for appellant Carlson, and by Mrs. Rose S. Rosenberg, counsel for appellant Stevenson, and Mr. John Caughlan, counsel for appellants Mangaoang and Sasieff, and by Messrs. Walter Binns and John E. Belcher, Assistants United States Attorney, and Mr. John P. Boyd, Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for consideration and decision, counsel for respective parties to file further briefs in five days.

[fol. 372] Before Stephens, Healy and Bone, Circuit Judges

ORDER DIRECTING ENTRY OF JUDGMENT—December 16, 1950

Pursuant to the order this day filed, it is ordered that a judgment be filed and recorded in each of above causes in accordance with the opinion rendered in the companion

cause of Frank Carlson vs. Landon, etc., No. 12742; opinion in these causes to follow:

[fol. 373] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12745

HARRY CARLISLE, etc., Appellant,

vs.

HERMAN R. LANDON, ETC., Appellee

JUDGMENT—December 16, 1950

Appeal from the United States District Court for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and this cause be, and hereby is remanded to the said District Court with directions to the said District Court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with the opinion of this court in Case No. 12742.

[fol. 374] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Stephens, Healy and Bone, Circuit Judges.

ORDER DIRECTING FILING OF OPINION—December 20, 1950

Ordered that the typewritten opinion this day rendered by this Court in above causes be forthwith filed by the Clerk.

[fol. 375] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,743

MIRIAM CHRISTINE STEVENSON, Formerly Burroughs, nee Kenkel, Alias Miki Ashton, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,744

DAVID HYUN, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

No. 12,745

HARRY CARLISLE, Also Known as Harry Carlyle, Appellant

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee

OPINION—December 20, 1950

Appeal from the United States District Court for the Southern District of California, Central Division

Before Stephens, Healy and Bone, Circuit Judges

STEPHENS, Circuit Judge:

These appeals in the above entitled cases were decided and order entered on the 16th day of December, 1950, coincident [fol. 376] with the decision and order in a like proceeding entitled *Carlson* v. *Landon*, No. 12,742. We noted in our memorandum, filed on the same date, that opinion in each case would follow. We combine the three in one opinion. The facts in each of the instant cases very largely parallel those set out in the *Carlson* case. The dates of the essential facts are not exactly the same in either case, but the vari-

ation of eve... and the dates of their happening are not great enough to make any particular difference. The applicable law, the principles applied and the reasoning and authority relied upon and set out in the *Carlson* case rule these cases and therefore we make specific reference thereto without repetition herein. The following alleged facts, undenied in the pleadings, are set out under the names of the three petitioners. Details as to each petitioner are set out in the petitions and we state their essence very briefly:

Stevenson

Petitioner Stevenson was born in England in 1919. At the age of 12 years she was taken to Canada with her family. She entered the United States in 1923 and since has resided in Los Angeles, California. With her mother she visited Canada in 1928 for a few hours and later in the same year she went to Mexico for a few hours where she was married to a United States citizen. In 1929 she made inquiry of the Immigration and Naturalization Service as to applying for citizenship but her legal entrance into this country was questioned.

Hyun

The petition for Hyun sets out a seemingly long period of limited restraint under a bail bond given under an arrest for deportation prior to the amendment to the immigration laws by the Internal Security Act of 1950, and complete restraint without bail since October 21, 1950, under an arrest for deportation pursuant to such amendment.

Petitioner Hyun was born in Seoul, Korea; is 33 years of age; was taken to Hawaii at an early age and resided there until December, 1947. His schooling resulted in a bachelor of science degree. In school he appears to have been a leader in social and religious activities. Although disqualified for military service during the late war because of his status as an alien, he became Captain of Re- [fols. 377-402] serve Officers Training Corps at the University of Hawaii. He has applied for citizenship; is married and has two minor sons. He has resided in Los Angeles, California, since December, 1947, and has engaged in a useful occupation. Petitioner's petition is replete with a detailed account of his life. He denies that his release would be detrimental to the United States in any manner.

Carlisle

The petitioner Carlisle was born in England in 1897 and has resided in Los Angeles, California, for the past 15 years.

The orders in these cases dated December 16, 1950, are alike and are the same as in *Carlson* v. *Landon*, No. 12,742, 9 Cir., — F. 2d —. The text of the orders is repeated, to-wit:

The judgment is reversed and the cause is remanded with direction to the district court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with this opinion.

Reversed and remanded.

(Endorsed:) Opinion. Filed Dec. 20, 1950. Paul P. O'Brien, Clerk.

[fol. 1] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Honorable Ben Harrison, Judge Presiding

No. 12491-BH Civil

In Re: FRANK CARLSON, also known as SOLOMON SKOLNICK, for Writ of Habeas Corpus.

No. 12492-BH Civil

In Re: MIRIAM CHRISTINE STEVENSON, etc., for Writ of Habeas Corpus.

No. 12503-BH Civil

In Re: HARRY CARLISLE, also known as HARRY CARLYLE, for Writ of Habeas Corpus.

No. 12505-BH Civil

In Re: DAVID HYUN, for Writ of Habeas Corpus.

Reporter's Transcript of Proceedings

Los Angeles, California

November 7, 1950

[fol. 2] APPEARANCES:

For the Government: Ernest A. Tolin, United States Attorney, Los Angeles 12, California; by Walter S. Binns, Assistant United States Attorney; and Ray H. Kinnison, Assistant United States Attorney.

For Carlson: Margolis & McTernan, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California; by John W. Porter, Esq.

For Stevenson: Rose S. Rosenberg, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California.

For Carlisle: Stanley Fleishman, Esq., 1014 North Argyle, Los Angeles, California.

For Hyun: Milton S. Tyre, Esq., 902 Quinby Building, 650 South Grand Avenue, Los Angeles, California.

Amicus Curiae: A. L. Wirin, Esq.

[fol. 3] Los Angeles, California; November 7, 1950, 10:00 o'clock A. M.

The Court: You may proceed.

The Clerk: In the matter of the petition of Frank Carlson, Miriam Christine Stevenson, Harry Carlisle and David Hyun, appearing on order to show cause and motion to strike.

Mr. Kinnison: The Government is ready, your Honor.

Mr. Porter: We are ready.

The Court: I am not going to spend any time on preliminaries in this matter. It is my understanding it was continued over to this morning to hear the cases on their merits and we are going to proceed with the merits and determine whether there has been an abuse of discretion by the Attorney General.

In the meantime there have been a number of motions filed with me. That being so, I cannot hear the matter this week unless we can finish it today.

As I stated before, the burden is upon the petitioners to show that there has been an abuse of discretion. We are right now where we were before, except you have had time to get your breath. We are going to proceed on that basis.

Mr. Porter: If your Honor please, we are prepared to go forward at this time on the basis that the petitions as amended in the case of petitioner Carlson, alleges facts establishing an abuse of discretion by the Attorney General and the respondent District Director in this matter, [fol. 4] none of which facts are denied; and that the return filed by the respondent in No. 12491, in the matter of Carlson, and I understand in the other cases identically, tenders no issue of fact in these respects.

So, on the basis of authorities which I will be glad to submit to your Honor now or at any time your Honor may desire, we must take it that the allegations of the petition which are undenied, are established as true.

The Court: But all you have made is a statement to the effect that their background is such and such. You have recited many things about their background but the Attorney General in his answer, or the Immigration Department, alleged that they are not good security risks.

Now, I think that is the only issue in the case—that is an issue of fact.

Mr. Porter: I differ with your Honor.

The Court: I don't think your allegation that there has been an abuse of discretion, just that bald statement, is sufficient to raise any particular question. That is a conclusion of law.

Mr. Porter: That is my summary of the facts of what the petitioner alleges, but the petition itself, your Honor, alleges specific facts on the relevant issues in connection with these applications.

[fol. 5] The Court: Just a moment. Have you any evidence to offer?

Mr. Porter: We have no evidence to offer because there is no factual issue upon which we can go forward.

The Court: The petitions will be dismissed if you have no evidence to offer.

Mr. Porter: I ask the court's permission to state my position on the record.

The Court: You may do that.

Mr. Porter: The respondent's return in the matter of Carlson alleges no facts whatever. It simply alleges in the first paragraph that the respondent is holding the petitioner in custody under what it calls proper and lawful authority, which is purely a conclusion of law. No facts are stated there.

The second paragraph needs no discussion. It alleges the issuance and service of a warrant in the deportation proceeding and raises no issue as—that paragraph raises no issue.

The third paragraph states as a pure, naked, unsupported conclusion that there was reasonable cause to believe that if the petitioner were released on bail he would engage in activities which would be prejudicial to the public interest and would endanger the welfare and safety of the United States.

In the first place, such a pleading by way of conclusions [fol. 6] tenders no issue which we could meet if we knew what the issue was, and under cases which I can cite to your Honor, including Stratton vs. Commissioner, in the Second Circuit, and other cases which I can continue with if your Honor desires.

Such a return is totally insufficient, raises no issue, and on the face of the record as a matter of law the petition should be granted.

Now, we are not prepared, your Honor, to assume a burden which does not rest upon us as a matter of law. The respondent here has submitted nothing which we are able or willing to meet.

As we have alleged in the amendment to our petition in the Carlson case, No. 12491, we are informed and believe that the basis upon which the respondent is acting here is this conclusion which he sets out in paragraph 3 of his return, and we allege by way of denial that there is any reasonable cause or any cause at all for that conclusion and that we have no information, nor have we been able to get any information, as to any fact or facts or anything resembling a fact, if your Honor please, to support any such conclusion on the part of the respondent.

We have further alleged that the petitioner in this case, the Carlson case, has never in the past engaged in activities which can be criticized in this fashion; that he has [fol. 7] no plan, intention, desire or purpose to engage in any such activities in the future if he is enlarged upon bail and that we have no means whatever of knowing what issues to meet if we were going to go forward with evidence this morning.

Now, it is the sheerest and clearest kind of a denial of due process of law to this petitioner, we submit, if the court holds that we are in the position of having to go forward to meet a showing which has not been made here by the respondent. The respondent in effect says, "I am holding this man because I think it is a good idea that he be held."

We have no means of knowing on the basis of what facts, if any—and we deny that there are any facts—which would support reasonably any such conclusion, but if they think they have facts on this let us hear them—let us find out what they are.

Under the cases the respondent here has the right, and I think the court has the duty to direct the respondent to file an amended or supplemental return which will be sufficient as a matter of law to tender an issue.

The Court: If I do that, gentlemen, then you will be here another week. Last week I tried to expedite matters

so you could get it before the Circuit Court while they are sitting here and save you the trouble of going to San Francisco.

I made my position clear, quite clear, last week but you [fol. 8] seemed to think because I suggested it that I was suggesting something against your interests.

I have been trying to expedite this matter so if you don't agree with me you can take it before the Circuit Court while it is in session here and save you a trip to San Francisco.

Mr. Porter: Well, we have no disposition to do anything other than expedite this matter, your Honor, nor do we have any disposition to do anything other than conform to the law—make the showing which is required of us and then rest upon that showing unless and until there is a responsive showing to the contrary.

Now, in the case of Whitten, 160 U. S. 231, the Supreme Court stated that in a petition for a writ of habeas corpus, which is duly verified, the facts alleged there may be taken to be true unless denied by the return or controlled by other evidence.

The same rule, in effect, was stated by Judge Denman in Ex Parte Duncan in this Circuit, 146 Fed. (2d) 576.

The same rule is stated in an extremely lucid and helpful opinion in the Court of Appeals for the District of Columbia in Hammerer v. Huff, 110 Fed. (2d), 113, where the court said this—which bears so directly upon our situation here. The facts there were extremely complicated and I think it is sufficient to say simply that the petition for the writ there alleged certain facts as to rep- [fol. 9] resentations made to the trial court at the time of imposition of sentence upon the petitioner. With respect to those allegations of fact, the Circuit Court said this:

> "This was not denied in the appellee's"—that is the respondent's—"return to the writ and therefore under Rule 8(d) of the Rules of Civil Procedure for the District Courts of the United States"—with a citation—"stood admitted in the trial court in the instant case."

And to the same effect is another statement by the Court of Appeals for the District of Columbia in the case

of Doris vs. Gill. That is a most elaborate and extremely illuminating opinion reviewing all of the various alternative procedures which have been invoked and can be utilized by the trial court in——

The Court: Now, Mr. Porter, if you feel this return is not sufficient I will give the United States Attorney a week to file an amended return if he feels it is necessary and we will continue the matter for another week.

Mr. Porter: Your Honor, I have already asked the United States Attorney whether he intends or desires to file an amended return.

The Court: I don't know what he intends to do. I continued this case yesterday and I feel I have been misled and [fol. 10] I don't like it, by the representations that were made to me that we would go ahead with the evidence this morning and we wouldn't take up the time with argument.

I told them yesterday that when you get started it is hard to get you stopped and I wasn't going to take up all day listening to your argument; that if you were going to argue the case you would have to argue it yesterday afternoon. I am not saying that in criticism of you, Mr. Porter, but when you get started talking you never can quit and you get so enthused and so worked up about your case which is just your characteristic. I also have characteristics that people don't like sometimes because I talk too much. I know that, so you and I have something in common in that respect.

I said if there were any legal points to be raised after our hearing of last week I would continue it until this morning and then I came down this morning to find a great many new questions raised

Now, if there are any questions I am going to continue it a week for further hearing. I don't like that because these people are in custody and if I am wrong, why, they are being deprived of their liberty, but you have invited it.

Mr. Porter: Well, I dispute that with all respect to your Honor, and I submit to your Honor that we are raising now the very merits of this action.

Merely because it takes the form of a motion to strike [fol. 11] or because I am up here arguing instead of some-

body being on the witness stand doesn't mean we are not reaching the merits, your Honor.

We are reaching to the very heart of this thing and we say to your Honor that if these respondents are not willing or are unable in either case to show any reason why he is holding these people in custody, then we are entitled as a matter of right to their release and it is the duty of the court to accord that right to them.

Now, we say that on the face of this record made by the respondent himself in his own return. He shows that he is either unable or unwilling to show any fact which justifies the action that he has taken and is continuing to take, and we say on the merits of the record——

The Court: Does each one of counsel want to argue the point?

Mr. Wirin: I wanted to make an observation when Mr. Porter is through, in connection with this point generally.

The Court: I am not going to listen all morning to one man and then have the rest of you get up and repeat the same thing.

Miss Rosenberg: I stand on Mr. Porter's argument and I wish to add this at this time, that I do not believe he has been prolix or has been verbose. I think he has come directly to the point, your Honor, and it would be prejudicial to our clients if Mr. Porter did not make in fact [fol. 12] the argument that he did.

The Court: Does anyone else have anything to say?

Mr. Wirin: I will follow Mr. Tyre.

Mr. Tyre: I have this observation to make, your Honor. We don't intend to mislead the court. I think there was some chamber conversation *about* we will probably get down to cases today, and I do think this is getting down to cases.

We are discussing here now whether or not, if no evidence whatsoever is presented, whether or not an issue has yet been presented by the Government.

I am not fully aware, frankly, of all the allegations of the other petitioners. I am quite aware of the allegation of my own, in the case of David Hyun, and I think honestly and sincerely we have set forth in the verified

petition virtually all the facts which can possibly be set forth to show what happened.

The Court: If I may ask, don't you all set forth the second warrant of arrest—allege that in your petition?

Mr. Porter: I do.

Miss Rosenberg: Yes.

Mr. Fleishman: Yes.

Mr. Tyre: It is virtually the same as the first petition with the additional facts that have occurred since the filing of that petition, and that would be only the question [fol. 13] of the second warrant of arrest, about which there is some legal aspects still pending, but we are not going to argue that this morning.

We have made a point in the petition and your Honor indicated he wants to get to the merits and that is what we are discussing now, we have alleged in that petition everything that we can possibly imagine concerning what could or could not be deemed the background of the individuals to show whether or not if they were at large at this time they would be a threat or danger to the community.

Now, we can't allege, your Honor, any more. We couldn't prove any more than we set forth in the petition.

Now, if the Government has any basis, your Honor, for filing a return which alleges some facts we then have an issue tendered.

Now, I am aware of the Second Circuit case, the Potash decision. That case says it is necessary to show by clear—and a preponderance of the evidence—clear and convincing evidence, is the exact language, that the petitioner should prevail. However, I want to point out in that case there is nothing to indicate what was stated in the original petition for the application for a writ of habeas corpus.

Now, for all that we can tell from reading that decision, all that was stated was that the United States Attorney for and on behalf of the Attorney General, has merely exer- [fol. 14] cised a discretion and alleged no reasons or basis whatsoever and the Government did take the position in that case that it didn't have to be reasonable; that it could be arbitrary.

The question then was referred back to the District

Court and they said the burden was on the petitioner. Apparently the only thing that was left at that point was whether or not an arbitrary discretion was exercised.

Now, here we have gone a lot further than that. We said it is arbitrary because—and we have alleged all the background facts which in my petition take up six, seven or eight pages in giving nothing except what has happened to this particular individual in connection with the Immigration and Naturalization Office.

If the Immigration and Naturalization Office, by the United States Attorney, will allege any facts controverting the facts which we have given then we have an issue tendered upon which it may be necessary at that time to present evidence. But at this time the return says absolutely nothing except—this one contains nothing but this one sentence, your Honor:

> "There is reasonable cause to believe that if the petitioners were enlarged on bail they would engage in activities which would be prejudicial to the public interest and endanger the welfare and safety of [fol. 15] the United States."

Which I think is nothing more than saying that: "We have a right to exercise discretion arbitrarily," because that is all the Attorney General has said.

> "We believe that he is a danger to the safety and a threat to the security of the public interest. We think so and that is that. That in itself is an allegation that we still think we have the arbitrary discretion to determine this one way or the other by ourselves."

Now your Honor has already indicated that he doesn't think the Attorney General has such an arbitrary discretion. If so, then it is clear this allegations of paragraph 3 is nothing but a conclusion of law and is immaterial if they exercised it arbitrarily, which, incidentally, there has been a traverse filed to that denying for whatever value it may have, but there is nothing there to indicate any possible basis in fact why these people are held.

If they would alleged why they are being held then we would have an opportunity to deny it and put on evidence.

to show that what they say is not true, or if we admit it is true an issue would be tendered. But at this point, if the court please, I don't think the second court decision requires on the basis of our own pleadings that the petitioner come forward with evidence at this point.

[fol. 16] And, your Honor, I just want to make this one observation. You have made it frequently. I want to reiterate it. And that is that these persons are being held at this time incarcerated without bail, without an opportunity to earn a living. It has been going on now since October 21.

I concede a certain part of it is due to the fact that we are arguing this matter but I think that is inevitable. These petitioners are entitled to counsel and entitled to every right under the law.

Now, I believe that a petition for a writ of habeas corpus should be heard in a summary manner, as summary as possible. The United States Attorney twice has had an opportunity now to file a return, at least in the Hyun case, and in two petitions, in two proceedings, they have failed to allege anything other than "We believe we have the arbitrary discretion of exercising it," and under those circumstances if the court should feel it is necessary to allow the United States Attorney to file an amended return, I believe in all good conscience and fairness to these petitioners that pending the filing of that return they should at least be admitted to bail, the same bail that was previously posted.

I want to point out this one more thing and then I am through, your Honor, and that is this, that up until just three or four weeks before this arrest, at least by implication and perhaps by direct reference in the Hyun matter, the Immigration and Naturalization Service saw noth-

[fol. 17] ing wrong or dangerous in permitting David Hyun to be at large. If you recall the allegation in my petition, I had written a letter to the commissioner in Washington, D. C., asking that Mr. Hyun be permitted to be enlarged at bail with the requirement that he report monthly be eliminated from his $2000 bail, because it was inconvenient and we didn't think it was fair or proper.

The commissioner answered that letter, late I think in

September, I think September 21st, if I am not mistaken, or approximately then. We received a letter from the commissioner stating that he received my letter and he didn't think it was proper to allow Mr. Hyun to be free without having to report monthly. Nothing was said that the $2000 bail wasn't proper or that he was a danger or a threat to the community.

The further statement was made that I should take the matter up with the local director and perhaps a more convenient time and place for reporting could be worked out for Mr. Hyun's convenience.

That was just a few weeks before this occurred. It seems to me on the face of that record, your Honor, the Government saw nothing dangerous or imminently a threat by Mr. Hyun's being at large on bail pending final deportation proceedings.

Maybe they have information they didn't want to divulge [fol. 18] at that time or maybe they think something happened in the 3-week interim. We have no way of knowing. But we think in all fairness and justice, which we believe is part of the due process to which aliens as well as every other person in this country is entitled, there should be some sort of hearing, either by the commissioner himself or, if he doesn't want to have a hearing, there should be allegations of facts set forth before this court so the court can see whether or not any real issue is tendered and pending such facts being allegad in the return I again respectfully ask that this court permit the petitioner to be enlarged on bail.

Mr. Wirin: I would like the court's permission to say just a few words and I shall not repeat the arguments which have been made.

The Court: Did you ever say a few words in your life and quit?

Mr. Wirin: This is once I am going to be an exception to my own rule.

If I may say so, your Honor, respectfully, with respect to the Potash case which your Honor said you would follow, the case itself and even the law draws a distinction between carrying the burden of proof and proceeding forward with the evidence. And there isn't any question that

the Potash case is, if your Honor follows it, is authority for the rule that the burden of proof to demonstrate an abuse of discretion is upon the petitioner; but that does [fol. 19] not necessarily mean that the petitioner must take the witness stand and that the burden of offering evidence or proceeding with the evidence is necessarily upon him, for it may be that he may be able to carry that burden of proof by the pleadings, by the showing made by the respondent and may be able to carry it by clear and convincing evidence without having to take the witness stand.

Now, that is my reading of the majority opinion and I think the concurring opinion by Judge Clark, which in a way at first blush and at one point seems to highlight the summariness of the judicial proceeding, namely, that the court will not review all matters, on the other hand I think supports the point which I have just made.

Judge Clark says:

"It would seem that to justify such—"

And this is one page 753 of the report:

> "It would seem that to justify such confinement here there must be better evidence than has been presented in the past and that some at least should be disclosed to the District Court to avoid the charge of arbitrary decision."

Now, let us look at this language. In the first place, the word is "justify." How do you justify? You put on evidence or you have a burden of proceeding with evidence in [fol. 20] order to justify a position. Moreover, after using the word "justify" in this broad sense, the next sentence talks about the duty of the respondent to put on better evidence than was adduced in other cases to show that the action wasn't arbitrary and then it concludes with the observation that it should be disclosed to the District Court that the action was not arbirary.

Now again I say, Judge, that doesn't mean the burden—the burden of proof is upon the respondent but it may be that under certain situations the burden of adducing some evidence, as Judge Clark said, and certainly Judge Clark's views were accepted by the majority be-

cause all Judge Clark did was concur with the majority and then expressed himself.

Now, then, I submit to the court that the bare, naked allegation which has been referred to by other counsel, and I promised I wouldn't repeat, made in the return now is not adducing to the court of any evidence to justify the detention and isn't a disclosure to the court of any matter. "Disclosure" means disclosing evidence, disclosing facts. It is the barest kind of naked allegation.

The situation is simply this: I am the Attorney General. I am the agent for the Attorney General. He doesn't even say that he is the Attorney General or that the respondent has reasonable cause to believe anything. He said there is reasonable cause to believe. What that means I don't know. That if enlarged the petition would engage [fol. 21] in activities, unnamed, unmentioned, that would be prejudicial to the public interest.

What are activities prejudicial to the public interest? Are they activities which the Attorney General or the persons who issued these orders consider inimical to the interests of the country?

It might very well be that a court which is more dispassionate, less concerned with the treatment of aliens, would consider them not prejudicial.

Now, I am about through. In other words, it seems to me that upon the showing now made the petitioners are entitled to release because the showing made is utterly inadequate in view of the specific factual allegations pertaining to the conduct and the background of the petitioners contained in their petition, which is undenied, and in view of the barest kind of a general conclusion, without disclosing any facts made by the respondent, and if that isn't true certainly I would urge upon your Honor that the petitioners are under no legal requirement to take the stand and to adduce evidence unless and until there is some kind of a showing in the form of evidence, in the form of a disclosure or evidence, as suggested and indicated by Judge Clark, by the respondent in this case.

I think I have been brief.

[fol. 22] Mr. Fleishman: I would like to say a few words so as to tie this in on behalf of petitioner Carlisle.

A demurrer has been filed highlighting some of these

uncertainties and ambiguities in the return and specifically I would like to relate again to what I know of the Government's charge against the petitioner Carlisle.

As I indicated at the previous hearing in response to a demand for a bill of particulars, the Government alleged that they charged that Harry Carlisle had been a member of the Communist Party between 1933 and 1936 inclusive.

Now I assume that this is what they mean when they say that Harry Carlisle if enlarged on bail would engage in activities that are inimical to the interests of this country.

Really I don't know whether because between 1933 and 1936 he was allegedly a Communist that therefore he should now be denied bail as a dangerous person.

I don't know whether I am supposed to try to meet that issue or not, or whether there is some other fanciful issue that I should try to meet.

The Court: Now, gentlemen.

Mr. Fleishman: Just one other point, your Honor, and that is I have a situation similar to the one Mr. Tyre called to your Honor's attention. Mr. Carlisle was arrested in June of this year. His then attorney wrote to Washington alleging that he thought $5000 bail was an awful lot of money and it should be reduced and Mr. [fol. 23] Reilly (phonetic) from Washington—I think he is Acting Assistant Commissioner in the Enforcement Division—wrote at that time:

> "Careful consideration is given in each case to all the relevant factors before the amount of bail is set. In the instant case it was concluded that $5000 bail was appropriate. I can see no reason to alter that conclusion."

Now, we have alleged in this petition that all of the relevant factors are the same now as they were there and assuming, as we must, that the Attorney General or his deputies properly exercised their authority, and found that Mr. Carlisle was not such a danger as to be kept in jail without bail, the same facts are still true today so far as we know and again Mr. Carlisle should be allowed out on bail.

The Court: What does the Government have to say?

Mr. Binns: Well, your Honor, I can suggest very easily to counsel that they are far more learned than I am. If I were representing these people and wanted to create an issue here I would have alleged in my petition a denial of the statement in the warrant of arrest that these four people are members of the Communist Party.

If you will notice, your Honor, they take some 10 pages to file a petition but they never get around to that particular point.

[fol. 24] Your Honor, I feel that I am a little bit at a loss here as to exactly where we are. As I understand now, we are on an order to show cause as to whether or not a writ will be issued.

I think the proceedings, your Honor, are that they filed the petition and then they have a hearing to see whether or not their petition sets up facts which would justify the court in having a hearing.

I feel that in these instances their petitions, being so carefully worded as to avoid any mention of the real gist of this matter, that those petitions in and of themselves don't justify the issuance of a writ.

Now, then, your Honor, our return is in a sense, after a writ, our return is the first pleading to that. They filed a traverse. It is never anticipated that the Government deny seriatim all the allegations in either the petition or the traverse. All that the Government does in a return is state the reason that they hold a man. We have set forth here very completely—of course, I noticed in reading just a few moment ago the Potash case, that in that case exactly the same situation prevailed that prevails here and it was commented on by the Circuit Court in their decision. It is on page 749.

The third paragraph of it says:

> "The petition for writ of habeas corpus does not [fol. 25] specifically meet the serious charge of the warrant of arrest that relator is a member of or affiliated with an organization which advocates the overthrow by force or violence of the Government of the United States."

If you will notice here, your Honor, with all of the papers that we have gotten in all of these hearings that that has never even been mentioned.

Mr. Porter: May I just add a couple of footnotes on this matter, your Honor?

The Court: You have pretty large feet too, haven't you?

Mr. Porter: I am very sensitive about that, your Honor.

First of all, with reference to Mr. Binn's last comment about the Potash case, there is a very simple answer in spite of what he points to as a deficiency in the petition.

The court there concluded that these men should be released on bail.

The Court: Wasn't that remanded?

Mr. Binns: Yes?

The Court: That the bail of $5000, anything more than $5000 would be excessive.

Mr. Porter: That is correct. In spite of the omission, as Mr. Binns would say, from the original petition.

Now, on this question of the procedure which Mr. Binns I think is really not as confused about as he would have us [fol. 26] believe, in the case of Doris vs. Gill, which I mentioned before, Judge Stephens of the Court of Appeals for the District of Columbia, reviews at great length, as I mentioned, the background and development of the habeas corpus writ and procedure and sets out—I think there are 10 alternative methods of handling an application for habeas corpus, which he lists seriatim.

No. 6 of those is the procedure which we find followed in these cases—that is the issuance of a rule to show cause why a writ should not be granted to which the relator may respond.

Then Judge Stephens goes on to say this:

> "If the procedure suggested in 6,"—that is, the order to show cause procedure is followed—"the judge may find that the facts admitted in response to the order to show cause entitle the petitioner to the writ and to a discharge forthwith as a matter of law."

And the court there cites Ex Parte Quirin, 317 U. S., 1; Walker vs. Johnston, which is in a later volume of the Supreme Court reports, 316 U. S. 101, and there are numer-

ous other cases to the same effect, if your Honor please, including Price vs. Johnston, which originated in this Circuit and reported at 125 Fed. (2d), 806, and subsequently went to the Supreme Court where it was there affirmed.

[fol. 27] And in that court, the Supreme Court, the opinion remarks that the Government's response to the order to show cause was too indefinite and vague to give petitioner a fair opportunity to meet the important issues, words which might well have been addressed to the situation before us now.

Now, there is a Second Circuit Court case earlier than the Potash case, if your Honor please, which comes very close to home at the present time.

The Court: What is the name of that case?

Mr. Porter: It is Price vs. Johnston.

The Court: You said there was an earlier case.

Mr. Porter: Yes, I am about to give that to you.

The Court: Is that the Zap case?

Mr. Porter: This is United States Ex Rel. Bieloszycka vs. Commissioner of Immigration, reported at 3 Fed. (2d), 551.

This was a petition for writ of habeas corpus to review an exclusion order which was based on a finding and commitment of the relator for insanity or mental illness of some sort.

The return merely alleged that the respondent was holding the petitioner or relator under a warrant, a copy of which was attached to the return.

The trial court took testimony on the facts of the case, and so on, and discharged the writ.

On appeal the Second Circuit had this to say—it af- [fol. 28] firmed the action of the trial court so far as the result was concerned in discharging the writ, but it said, and this is a quotation:

> "The ordinary and proper practice is to show by the return exactly what the Department of Labor,"—as it was then called—"exactly what the Department of Labor through its various boards and officers had done in the premises."

The commissioner failed to do that and the return was insufficient.

The court then went on to say that the trial court in taking testimony had held the same kind of hearing that ought to have been had and in that situation had been had by the board of special inquiry of the administrative office.

"The practice"—said the court—"is strongly disapproved.

"It is substantially a usurpation by the courts of those duties of investigation and fact ascertainment which the statute imposes on the Department of Labor. The court below had no right to conduct what was substantially an original investigation; its function was to investigate what the Department of Labor produced as the result of its own investigation."

Now, I recognize that that case is not on all fours for [fol. 29] the reason it was a review of a final order of the administrative body, but the logic and the procedural approach expressed in the opinion of the Circuit Court of Appeals is just exactly as applicable, I submit, to a situation where the question is on what basis the respondent administrative agency deems it necessary or proper to hold these people in confinement.

One more brief point and I am through. The grounds alleged in the return in paragraph 3—there is this sweeping conclusion about reasonable cause to believe, and so forth. That turns out, if your Honor please, on examination, to be in precisely the language of one of the provisions of the Immigration Act of October 16, 1918 as recently amended by the McCarran law and is a separate and independent ground for deportation under that law.

Section 22 of the McCarran law amends the Act of October 16, 1918 as previously amended, so as to add a number of grounds for deportation not previously set forth in the law. And the very first of those, if your Honor please, the very first of those is this, stripping away the preliminary language, that the person entered the United States to engage in activities which would be prejudicial to the public interest or would endanger the welfare or safety of the United States. It is word for words, the language of paragraph 3 of their return.

[fol. 30] So, what they are saying, if your Honor please, in addition to or apart from the fact that their conclusion amounts, as Mr. Tyre said, to nothing but a declaration of their plenary discretion, what they are saying is that these people who are charged in the deportation proceedings were deportable on ground (a) are being held without bail indefinitely pending determination of deportability because they are deportable on ground (b).

Now, I submit, your Honor, that that is the height of arbitrary abuse of process and discretion on the part of the respondents in this matter and I join heartily in all that has been said by my fellow counsel, Mr. Tyre and Mr. Wirin and Mr. Fleishman, and I earnestly submit to your Honor the propriety of a ruling, first, upon my motion to strike and I take it Mr. Fleishman has filed a demurrer to the return.

I then have an answer or traverse which I am prepared to file and on that basis I submit to your Honor that the petitioners have amply shown a basis for their discharge on the state of the present record.

The Court: Gentlemen, I haven't changed my original viewpoint on the approach to this case. I have memorandums from various cases.

Section 156 was first called to my attention, I believe, by Mr. Porter. I believe he referred to it as the McCarran amendment where bail was increased very substan-

[fol. 31] tially, and in that case I went along with the Second Circuit's ruling and held that unless there was some showing that the bail in excess of $5000 would be unreasonable. And in that study it developed that the first matter to come, I believe, before the Second Circuit was the provision in the bond that required reporting. The Second Circuit held that that could not be made a part of the condition of the bond.

Then comes along the McCarran Act and adopts in part the ruling of the Second Circuit and reverses it in part by making it a condition of the bond and a requirement for reporting.

In the Wong Wing case, reported in 163 U. S., 228, which was an opinion written by Chief Justice Taft, he emphasized that which is emphasized in other cases, the power of Congress to exclude aliens altogether from the United

States or prescribe the terms and conditions upon which they may come to this country and to have its declared policy in that regard enforced exclusively through executive officers without judicial interference. That is settled by our previous decisions. And then I notice that Judge Jenney followed the same in Ex Parte Perkov, Federal Supplement, 864, where he stated:

> "There is then no power in the United States Courts to admit to bail in immigration cases. Congress has reposed the discretion in the Attorney General and [fol. 32] there it must remain. This the petitioner admits in his later brief. He argues, however, that under the statute and the facts he must be deported to the country of his nativity, and wartime conditions make it impossible to deport him to Yugoslavia. Consequently, the argument continues, denial of bail pending the final disposition of this cause constitutes a flagrant abuse of the discretion vested in the Attorney General."

Then we come along to the Zapp case which also holds, and that is found in 120 Fed., 762:

> "It is well established that the expulsion of aliens is the sovereign power necessary to the safety of the country, to be regulated by the legislative department by such statutes as it deems wise policy to require. Deportation, however had on the individual, is not punishment. It is a proceeding civil and not criminal in nature. We think it quite clear that the right of Congress to provide for the elimination of undesirable aliens is not hampered or limited by the fact that such aliens may have become entangled with other prohibitions of the law. Proceedings in deportation matters are entirely apart from any proceeding to enforce the criminal laws and must proceed according to the [fol. 33] statutes relating to them."

Then we jump over into the Potash case which has been referred to here and I might say—or in the Zapp case—was the first time it was written in the law, that the immigration authorities had the right to hold, to retain in custody or admit to bail or grant parole. Then we jump

over into the Potash case which we have discussed here this morning, and among other things it says:

> "However, in any consideration of denial of bail it should always be borne in mind that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative determination is final. If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth [fol. 34] regarding the exercise of discretion by the Attorney General are observed."

The sum and substance of my holding is this, that this is a matter that is within the discretion of the Attorney General; that when he issues his warrant that the burden then shifts to the petitioner in a habeas corpus proceeding to establish by clear and convincing showing that the Attorney General has abused his discretion.

It is the natural presumption that an administrative officer is performing his duties and anybody attacking the administrative body would have the burden of establishing that he was in error.

Here we have the case where warrants were issued and I take the position that the burden then shifts, as long as the evidence is here of the warrants having been issued, before the court, that then the burden shifts to the petitioners to establish by clear and convincing evidence that there has been an abuse of discretion.

In other words, I am right now where we were the other day when you people dismissed your petitions, and I am going to, whatever you call the motion to strike or demurrers, and so forth, deny your motions and I am going to give you that opportunity now, gentlemen.

There is no use of camouflaging this picture. The Gov-

ernment claims these people are dangerous to the security [fol. 35] of the United States and you are here as their attorneys, and rightfully so, defending them against that charge and I am giving you that opportunity to assume the burden that I feel is upon you in attacking a warrant issued under the authority of the Attorney General of the United States.

I often think of counsel in representing people this way, that if they wanted to be fair why not put them on the stand and have them testify as witnesses. Why not get down to the merits of this case?

All of you know that if the Communist movement should succeed you would all be out of a job.

It is like a lawyer told me when I first started to practice law: "Don't depend upon the code entirely because the legislature might come along and repeal it." So, if a Communist movement were to succeed in this country we wouldn't have any laws. You wouldn't be able to say that you are attorneys at law any more because there wouldn't be any law that you were familiar with or under which you could act.

But that is neither here nor there. These people have a right, and I am not criticizing counsel—I don't want to be taken as criticizing counsel. These people have a right to be represented in this court and be heard and it is your duty as their attorneys to present their cause, but I cannot be entirely unaware of the activities that are going on around us every day.

[fol. 36] I have tried to keep myself free from any hysteria that may be in the wind these days and that may have caused the amendment to the McCarran Act, but I believe if this was the same situation as in the Potash case, and we had a rule established there—that wasn't a Communist case. That was a German national that they were dealing with, but it sets down virtually the same rule of law as we have here except the Potash case is in line with this case.

We have people here that the Attorney General in the exercise of his discretion has held to be dangerous to the security of the United States and this court is not going to release them unless they make a showing to overcome that presumption.

Mr. Tyre: Might I just make one other observation on the point that you have just raised?

The Court: Yes.

Mr. Tyre: I want to raise this point. It deals directly with the point you have just made and that is the threat that exists of Communism in the United States. I don't think anyone contends that there is a successful Communist movement now.

The Court: They haven't been successful so far.

Mr. Tyre: That is right.

The Court: And you are not stopping it any either.

Mr. Tyre: I don't think anyone contends that I think [fol. 37] within that framework.

We are then faced with the situation that Mr. Justice Jackson faced in the Williamson case.

Now, I know your Honor has many times during the course of these proceedings distinguished cases on the ground that they were criminal cases.

The Court: I do not differ with Justice Jackson nor do I differ with our Circuit Court in the Bridges case because after a court has certified that there was probable ground for their release I don't see what else could happen.

Mr. Tyre: Let me say this, your Honor. Now, in the Bridges case Mr. Justice Healy didn't even discuss the question of security to the United States if Mr. Bridges were at large. He said that it was as astonishing or startling as it was novel; but Mr. Justice Jackson does discuss it. Mr. Justice Jackson when he granted bail not to 11 defendants in general but to 11 persons who were then the executive board of the Communist Party of the United States, and admittedly so, he granted them bail pending appeal, not on just the traditional and well-established grounds that are usually in a criminal appeal, but on the very unusual premise as to whether or not they were a danger to society pending the appeal.

Now, he didn't talk at all about the fact that this was normal in a criminal case. As a matter of fact, Mr. Justice [fol. 38] Healy indicated this whole question of danger was immaterial.

The Court: That was true in the Bridges case because Bridges was charged with perjury.

Mr. Tyre: Mr. Jackson does not say it is. He goes on

the question of whether or not a substantial question was raised.

With all due respect to the Second Circuit, I think there is a substantial question.

Government counsel said in their argument that they could not release the 11 members of the executive board of the Communist Party pending appeal because they were dangerous to the security of this country.

If I assume that the defendants are disposed to commit at every opportunity this loyal axe which would be helpful to the Communist countries it is still difficult to reconcile with traditional American law the jailing of persons by the courts who visualize, but as yet there are no crimes committed, and that persons should go to prison to protect society from predicted but unconsummated offenses.

Such a philosophy is unprecedented in this country and is so fraught with danger of excesses and injustices that I am loathe to resort to it.

As the court well knows there is further language and I want to quote only one short paragraph of that further language which deals with the whole question as to whether [fol. 39] or not, assuming that a person is engaged actively in the Communist Party, whether that in and of itself should be grounds to deny the person bail pending further proceedings. The court says this:

> "The right of every American to equal treatment under the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day."

[fol. 40] And bear in mind, your Honor, that in the Williamson case these 11 defendants had already been convicted of the crime of which they were charged.

In our case we have no conviction and this is an order for deportation. These matters are now pending. We may assume that all of these persons were or may be now members of the Communist Party or even active in the Communist Party, which we don't yet know, but assum-

ing all that I don't see how we can set aside Mr. Justice Jackson's own view.

The Court: The only thing is, Mr. Justice Jackson's view was not the view of the court. That was his personal view the same as it was Mr. Justice Douglas' view in the case of Toyko Rose.

This may be not the first time that I am wrong. I have been reversed by the Circuit Court before.

Mr. Wirin: Not very often.

The Court: And undoubtedly I will be in the future, but I feel that Congress in the amendment to the McCarran Act has recognized a present danger and I am going to rule on the side that I think may have a tendency to protect the security of the United States. I am not going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in this community. If that is my duty let the Circuit Court say so and assume that burden. If they say I am wrong they will send it back and the United States Attorney can file [fol. 41] an amended return and we will go to trial again on the issues.

I don't know anything about these people. I don't know any one of them. I wouldn't know them if I saw them. But I do say that I am giving them now their day in court and an opportunity to establish that they are not a threat to the security of the United States.

Maybe on some technical ground I should direct the Government to amend its return and continue the case a week for that purpose, but I think it is more important that you gentlemen get this matter before the Circuit Court unless you want to put on some evidence. If you want to put on evidence I am ready to hear it.

Mr. Tyre: The view which your Honor just expressed, by inference at least, is inconsistent with Mr. Jackson Jackson's view which you point out as only one Justice; but I want to point out I think the record will show that Mr. Justice Jackson in cases of this sort has not been with the minority but always on the majority side of the case.

The Court: I have the highest respect for Justice Jackson. He is responsible for my being here today and naturally I have a very high regard and great respect for his viewpoint, but I feel that that was a criminal case

where the lower court, and I believe the Government itself stipulated there was a substantial question involved, and under the law those people were entitled to bail. Our [fol. 42] own Circuit held that under those circumstances, in the Bridges case, there must be a finding by the trial court that there was a substantial question involved and I believe there was nothing else to be done but grant bail.

If this were a criminal case and there was a substantial question involved I wouldn't go into the question of whether or not they were a threat to our national safety. I would agree with them and grant bail.

If these men were charged in other proceedings, charged with committing overt acts, that would be on thing, but we have here aliens who are only here by reason of the generosity of our country. You might say they are guests of our country. We have a right to admit them and we have a right to throw them out. As a matter of fact, under the law that is well established, if Congress had so desired in this very act they could have deprived this court of any jurisdiction. They could have given the Attorney General exclusive jurisdiction and this court wouldn't have had a right to review it.

However, I have ruled with you gentlemen on that point and contrary to the views of the Government, that they didn't give that exclusive right and that the court has jurisdiction.

As a matter of fact, the courts may hold that I have taken up too much time—that I shouldn't have even heard the matter. They may hold the McCarran Act gives the Attorney General exclusive jurisdiction. But the pre- [fol. 43] amble to the McCarran Act, which amended this section, recognizes a present danger and as a trial judge I am not going to interfere with that present danger without some showing. I am not satisfied with just the talk of counsel.

Mr. Tyre: It is a little difficult for counsel——

The Court: I realize it is because I have some very definite views in this matter that have crystallized over a period of time. And you people have also been doing a little playing.

Mr. Tyre: I think my shoes are probably a little larger larger than Mr. Porter's, but I would still like to add a

footnote which I hope in substance will not be a larger foot.

Mr. Justice Jackson in the Williamson case, with reference to the point you just raised——

The Court: Counsel, you have referred to that.

Mr. Tyre: I am not going to repeat myself.

The Court: That is in your record and you can argue that to the Circuit Court. As far as I am concerned, my viewpoint and my duty and my understanding of the law is such that you could argue all day and it wouldn't change my viewpoint one bit. I am putting it right up to you. You may offer evidence that these people are not threats to the national security. If any one of these people want to take the stand I will give them that privilege and I will weigh the evidence and determine whether or not they [fol. 44] are a security risk; and if they offer evidence to show they are not a threat then the burden will shift to the Government to establish that they are. But until that is established I don't believe the Government is to be placed on its proof.

Mr. Tyre: It is obviously no use arguing further with your Honor.

The Court: Has it taken you gentlemen an hour to find that out?

Mr. Tyre: I can't agree with that. I have been before many judges, your Honor, and I am sure when you were on this side of the bench, where the court has indicated one view but has always allowed counsel to argue his case for the purpose of changing that view—what I want to say is that I think your Honor was kind enough at the outset of this hearing to indicate what his views were so we had an opportunity to argue directly to the issue.

The Court: I think perhaps I have studied more cases on this question than the lawyers have because the moment the petitions were filed I went to work on it and have done a lot of work on it. I don't know who filed the first petition but as soon as I got it I started to work on Section 156.

But even with all of that don't misunderstand me, I may be in error as to the law. My interpretation may be erroneous. I am simply making it easy for you to go to

the Circuit Court upstairs and if I am wrong you can get [fol. 45] these petitioners out this afternoon.

Mr. Tyre: I have nothing further to add. I have a lot I would like to say but if it would be useless I am not going to take up the court's time.

The Court: I would save my breath and talk to the Circuit Court.

Miss Rosenberg: I should like to be heard on one point that hasn't yet been raised.

I hope the size of my feet is not determinative of any matter before the court.

I should like to call your attention that your notion of the rights of aliens in this country is perhaps not exactly correct. All aliens do have rights here and they cannot be thrown out of the country at the whim and caprice of anybody, whether an administrative officer or a judicial officer. They are protected by the Constitution.

Speaking of guests, your Honor. Perhaps all of us, your Honor, are guests here. I think we are all guests of the Indians or perhaps the Mexicans. I think there is great dispute as to whether we have a right to be here at all, so that your notion, your Honor, if I may say so most respectfully, with regard to aliens is not that they are here on suffeyance.

The Court: Counsel, what I am trying to say is that [fol. 46] their rights are established by Congress and their rights may be subject to approval by the courts or they may be absolutely an executive problem. That has been recognized in all these cases. As a matter of fact, when we had the original argument here the Government's claim and contention was that they had an absolute right—that they had absolute jurisdiction and I think it was admitted here that if Congress had intended to give exclusive jurisdiction to the Attorney General they could have done so.

Miss Rosenberg: Are you saying by that, your Honor, if Congress had done so that Congress is able then to formulate laws which are a subversion of the Constitution itself? My understanding is, your Honor, that the rights of aliens are protected by the Constitution.

The Court: Chief Justice Taft is pretty good authority.

Miss Rosenberg: Well, the Constitution is the authority

that I rely on, your Honor, and I trust that is the opinion of your Honor also, although you have indicated that despite argument your views are intransigent. I trust not, because there is one point I should like to raise and that is if you abide by the ruling you just suggested that it is the responsibility of the petitioners in this matter now to move forward and to prove by clear and convincing evidence that they are not, as it is alleged, inimical to the interests o fthe United States, you are placing these peti-
[fol. 47] tioners in a position where they should not be placed.

There are presently pending deportation proceedings, your Honor, in which proceedings they are alleged to be members of the Communist Party and in those proceedings the burden of proof is on the Government to prove such allegation.

If the petitioners are here required to make a showing, which you have indicated they must make, you are doing in fact by indirection which cannot be done by direction in the deportation proceedings where the burden of proof is on the Government.

The petitioners there in those proceedings may claim certain privileges, your Honor, of which you are well aware. There are many devices of trial practice and the petitioners in the deportation proceedings may not choose to take the stand at all. There are various methods by which lawyers——

The Court: May I ask in that respect, cannot the immigration officials call them to the witness stand and then they have to answer a question or exercise their privilege?

Miss Rosenberg: They can claim the privilege, your Honor.

The Court: But don't the cases hold in deportation proceedings that a strong inference arises from that?

Miss Rosenberg: Your Honor, no inference may be deduced from the fact that a witness does not take the witness stand.

The Court: If he does not take the stand, but can't he
[fol. 48] be called to the stand and if he refuses to testify an inference may be drawn from that? It is a civil proceeding, you must remember.

Miss Rosenberg: Well, they are really not fully civil

proceedings, your Honor, because of the punishment, although you have said that it cannot be properly termed "punishment," but it is a deprivation of——

The Court: It says technically it is not punishment.

Miss Rosenberg: It is punishment of the greatest sort, so it seems to me on that they would not be obliged to take the witness stand and no inference would be drawn.

My point is that you are requiring, in putting these petitioners in a position by these proceedings which are denying to them their proper rights in a deportation proceeding. And, as Mr. Porter pointed out, the inquisition or the examination, your Honor, of evidence here is not the proper function of the court. It is a usurpation by the court of this investigative function and properly belongs in the deportation proceeding and I contend, your Honor, that this is a denial of due process by forcing upon the petitioners in this matter the burden which they do not have in a deportation proceeding.

There is just another point, your Honor, I would like to observe and that is, your Honor has made on several occasions remarks with regard to the Communist Party [fol. 49] and what the Communist Party stands for.

As far as I know, your Honor, there has been no adjudication on that point. There has been no finding, your Honor, with regard to the Communist Party that it stands for the things which you have indicated.

True there is the McCarran Act, but those are merely conclusions. They are not based on any evidence.

As a matter of fact, since bail was granted in the case of the 11 people there is evidently a substantial question in regard to it and it seems to me, your Honor, if I may, I do not think it appropriate for a court to bring into the courtroom what you yourself have said perhaps is present, a kind of hysteria.

It seems to me that in these trying times, your Honor, you should guard, if I may be permitted to say so, your Honor, with the utmost zeal the defense of those people with regard to whom there is no evidence as to their subversive character. They are merely conclusions and it seems to me that it is not an attitude in which a case of this kind can properly be tried. If the court by not alone innuendo, your Honor, but forthright statements of fact,

can make allegations with regard to which there is no proof then indeed it is hysteria, and so I say for these reasons and for all the other reasons I urgently urge upon your Honor that if you remain not intransigent but you recognize, your Honor, the justice of people, though they [fol. 50] be aliens, they are nevertheless protected by the Constitution.

Mr. Porter: May we have a short recess, your Honor?

The Court: I want to ask Mr. Wirin a question because of his familiarity with these—not this particular type of proceeding, but the general proposition that one finds in deportation proceedings. I have never appeared before a board, before a board in a deportation proceeding, as an attorney so I will have to get my information concerning their proceedings from someone else, but it seems to me that in some of the cases that I have been reading that an alien can be called to the stand and questioned. He can there exercise his right to refuse to answer on the ground that it might tend to incriminate him and he cannot be compelled to testify, but the courts have held that a strong inference arises from the fact that he refuses to testify. Is that the law?

Mr. Wirin: I must confess that I am not as familiar with the immigration procedure as your Honor's question would attribute to me, but I will give your Honor my observation about it.

I think your Honor's observation is correct except for one exception. I think it is true, one, that the immigration service may call the respondent as a witness. I think it is further true that he may not—that he doesn't have to testify if he doesn't want to and that an inference may [fol. 51] be drawn against him because of his failure to testify, but not an inference drawn against him because of his failure to testify because of self-incrimination. In other words, if the refusal—

The Court: Suppose that a man is put on the witness stand and asked directly the question: "Are you a member of the Communist Party," and he refuses to answer on the ground that that answer would tend to incriminate him, would that raise an inference, his refusal to answer?

Mr. Wirin: Judge, my opinion is that if he refused to answer on the ground that it would tend to incriminate

him no inference could be drawn against him. However, if he refused to answer generally then an inference may be drawn against him. That is my view of it.

The Court: I didn't make a notation of the case that I have in mind but I ran across that someplace.

Mr. Binns: 203 U. S., 149. That was a habeas corpus hearing and that is the case in which your Honor remembers the language, that a strong inference is drawn against him for refusing to answer. There is no discrimination made as between failure to answer and on the ground it might incriminate or just failure to answer.

Mr. Wirin: You say in actual fact that case did not involve a claim of privilege because of self-incrimination?

Mr. Binns: I said the case doesn't raise any such thing. [fol. 52] Mr. Wirin: I am conceding and saying that ordinarily a refusal to answer may result in a strong inference drawn against a man, but that doesn't apply when the refusal to answer is by virtue of an assertion of a constitutional right, namely, self-incrimination. That may be the law tomorrow but I don't think it has been adjudicated that the assertion of the right of self-incrimination permits an inference to be drawn against a man.

The Court: There have been a number of cases cited to me that I may or may not have read. You gave me a number of cases, Mr. Porter. Do you mind giving me those cases over again? They were coming at me too fast.

Mr. Porter: On the effect of uncontradicted allegations in the petition I cited these cases: Whitten, 160 U. S., 231. Also the Lawyers Edition citation.

The Court: I will have to have that again.

Mr. Porter: That is Whitten vs. Tomlinson.

The Court: You cited 125 something.

Mr. Porter: That is a little farther down. There are others here. There is another case in the same volume of the United States Reports, Cohl vs. Lehlback, 160 U. S., 293.

Then 110 Fed. (2d), 113.

148 Fed. (2d), 857. Certiorari was denied in this last named case. By the way, in 65 Supreme Court 1580 there is a case I would like the court to read.

[fol. 53] The case in 125 Fed. (2d) is at page 806, Price vs. Johnson. That went to the Supreme Court and is reported there. The same case is in 334 U. S., 266.

Then the Second Circuit case that I discussed is 3 Fed. (2d), 551.

The cases holding that conclusions in a return are insufficient, 176 Fed., 735. Generally 39 Corpus Juris Secundum, 653.

The Court: Are there any other cases that you want to call to my attention?

Mr. Porter: 146 Fed. (2d) 576, and the point for which it seemed to me relevant was a statement by Judge Denman concurring at page 589.

The Court: Now, gentlemen, I unless you desire to submit some evidence the matter will stand submitted.

Mr. Porter: I think that we can probably submit it in just a few minutes, your Honor, if we might have about a 5-minute recess to check our ideas.

The Court: All right, we will take a short recess.

(Short recess.)

The Court: You may proceed.

Mr. Tyre: If your Honor please, during the recess, among other things, I have talked with Mr. Binns concerning the Hyun application. We have on file now in that matter a traverse on the return.

[fol. 54] The usual procedure, we understand, is to incorporate in that traverse virtually the allegations of the petition.

At this time I want to move, pursuant to stipulation, that the traverse be deemed amended to include all of the allegations of the petitioner—all of the allegations of the petition for a writ which was filed in this matter.

Mr. Binns: We would have no objection to so stipulating, your Honor.

The Court: That is satisfactory.

Mr. Fleishman: On behalf of the petitioner Carlisle I would like to make a similar motion. I also would like to incorporate all the allegations in the petition in this matter in my answer.

The Court: What is the effect of that, so I may understand it?

Mr. Binns: The effect of that stipulation, as I see it,

your Honor, is that their traverse, which they have filed, is deemed to include all the allegations of the petition, but under the cases there is no compulsion on the part of the Government to formally deny those. They are deemed denied.

After all, a habeas corpus proceeding is somewhat of an informal proceeding and somewhat of a summary proceeding.

Now, as I stated to counsel during the recess, I don't know for sure whether we have progressed to the point of [fol. 55] filing traverses here. I feel that we are probably still back on an order to show cause as to whether or not the writ shall issue at all.

The Court: So I may understand, when the practice developed in the Federal Courts that an order to show cause is one of the means of replying, it is immaterial whether the court issues the writ. Mr. Wirin probably has had more experience with these matters than anybody else. Isn't that the situation? Hasn't that been the practice that has developed?

Mr. Wirin: Judge, if you are addressing me, it is a practice which has developed—I think it is a practice, if I may say so, which the Supreme Court has frowned upon, and I think it has frowned upon that practice as practiced by the courts of the Ninth Circuit, including the Court of Appeals, our Circuit, which was reversed in a couple of cases on the ground the writ should have been issued where there was a factual showing made in the petition.

The Court: Suppose I were to find that there was a technical question involved and direct the writ to issue returnable next week sometime, without bail, then where are you? The first thing you know the Circuit Court will be gone and you will have to go to San Francisco to take up this matter. That is what I am trying to avoid. I am not trying to make it hard on you people. I simply don't agree with you as to the law. As a matter of fact, I am [fol. 56] trying to make it easy for you to get a review and as inexpensively as possible. That is why I was quarreling with you last week. It seemed to me we were forgetting the practical side of it and wasting time over technicalities.

Mr. Porter: Your Honor, in order that the record may

be completely clear in the matter of Carlson, No. 12491, may I ask, first, if I am correct in my understanding that the motion to strike portions of the return which I filed in this matter, has been denied?

The Court: Yes.

Mr. Porter: Then may I have leave to file what I have designated as an answer rather than a traverse? It amounts to the same thing, I believe, an answer to the return in this matter, a copy of which I have already served by mail on the United States Attorney.

The Court: Yes. May I make this inquiry? When we get through with all our maneuvers and finally end up with what amounts to nothing, unless you are working on a per diem—and I hope you are—I hope you are getting a good per diem; I like to see attorneys get paid for it when they work—is there going to be any evidence offered if I still maintain my ruling? Are any of you going to offer any evidence?

Mr. Porter: I desire to submit the matter of Carlson now, your Honor.

[fol. 57] The Court: If there is any question in these matters that you want to make returns and answers, I may go a little further and direct a writ returnable next week. My time is limited. I don't see why if you have any evidence you want to offer why we can't have it now. It might be it wouldn't be necessary to go any further. You people, so far as I am concerned, can very easily shift the responsibility to the Government.

Mr. Porter: Well, if I may answer that as far as my client is concerned, your Honor, it is my position that the only matter upon which the court has indicated a desire to hear evidence is the matter in issue in the deportation proceeding. All other evidence which is relevant is set forth in the petition. It is uncontradicted and it must therefore be deemed to be true.

The Court: I have assumed the position that there is only one reason that the Government has issued a new warrant and denied bail, and that is on the ground that they, in their opinion, are security risks; that as far as their personal conduct otherwise is concerned, it is not questioned.

I believe I made that statement before and I believe

that is what the Government stated was their position in the other hearing.

But I have understood that that was the only question and I made the statement that if these people were not con- [fol. 58] nected with an organization such as has been classified as subversive, and will take the stand and testify to that effect or offer other evidence to that effect, that then I would feel that the burden would shift to the Government.

Of course we differ substantially as to where the burden lies. You take the position that the Attorney General should assume the burden of justifying his denial of bail. I take the position that when he denied bail he has exercised his discretion and that the burden then shifts to you to show there has been an abuse of discretion, and I don't think you can show it by mere papers. I think the court is entitled to have evidence.

Now, that is where we differ substantially. Some people think that you should come here and simply by talking induce the court to make a finding that the Attorney General has abused his discretion, but it is going to take more than talk to convince me that he has abused his discretion. It is going to require evidence and I am willing to listen to the evidence. The only thing is that next week I am not so certain about my time. I know now that Monday, Tuesday and Wednesday are already taken up. It will be next Thursday, a week from this Thursday, before I could give any more time to these cases outside of today.

On the other hand, I might after reading these cases find that the return was insufficient. The United States [fol. 59] Attorney in reading them might find that he desires to make a more extensive return than he has made. I don't know. You may convince him.

Mr. Porter: Now is the time for him to make that move.

The Court: But you have raised these points all of a sudden. I was rather disappointed that we didn't go ahead with this matter yesterday afternoon because last evening I would have had an opportunity of reading the cases, but you come in and spring something on me when I thought we all understood pretty well what the issues were. I am going to determine whether to issue a writ or simply order a dismissal now.

Mr. Porter: All I can say is that in the light of the argument and discussions with the court this morning I earnestly hope that the court will make a final ruling promptly in the matter.

The Court: I don't know how promptly it will be because you have raised additional technical questions.

Mr. Porter: And we made our position clear to your Honor.

The Court: But there are additional matters this morning comparable to the ones that ended in the blowup last week. This morning you have raised questions as to the sufficiency of the return of the United States Attorney. Now, if that return is insufficient I would afford them the same opportunity I would afford you if your petition was [fol. 60] insufficient. I would afford you an opportunity to amend and I will afford them an opportunity to amend their return if they consider it necessary or if I find that their return is insufficient I will give them an opportunity to amend the same as I would you.

Mr. Porter: I just hope that your Honor will advise the parties of your conclusion on this matter as soon as possible.

The Court: The only thing is, I was hoping we could get this down to a clear understanding that there was one issue involved, and that is whether or not the court should compel the Government to assume the burden justifying the issuance of this new warrant and denying bail, or whether that burden was upon you to show that there was an abuse of discretion. I was hoping we could narrow the issues down to that point and then I would be in a position to rule as I have indicated.

But now there are technical points involved that naturally the court wants to be satisfied with. I was advised yesterday that we would be able to go ahead this morning. I assume the attack on the return is probably new to the Attorney General. I haven't heard from him. He hasn't asked for any additional time. He may be willing to rest the matter on his return. Are you?

Mr. Binns: As far as my understanding of the law is now we are, your Honor.

[fol. 61] The Court: It is not what your understanding of the law is now; do you know?

Mr. Binns: We will rest on the return as it stands now.

The Court: Then I will determine whether or not I think it is sufficient. If I find it is sufficient you will know what my ruling is going to be.

Mr. Wirin: May I address the court for a moment?

The Court: Yes.

Mr. Wirin: In the first place, I am appearing as amicus curiae and I am not determining policy for the petitioners, and I am not addressing the court with respect to the policy of the petitioners, but I want to make an observation on a matter in connection with which your Honor has just said if your Honor should decide, despite the position of the United States Attorney, that his return is not sufficient, then it seems to me that the petitioners would be entitled to not only the issuance of a writ, indeed would be entitled to the issuance of the permanent writ if your Honor should decide it is not sufficient.

The Court: You wouldn't expect me to do that any more than if you were to come in here, Mr. Wirin, with a petition for a writ that might have some defect in it. You know from your experience in this court that I would give you an opportunity to correct it.

Mr. Wirin: Yes.

[fol. 62] The Court: I wouldn't take advantage of you because of some technicality. You have tried enough cases before me to know that I don't do that.

Mr. Wirin: I agree with that. Then I want to make this further observation in the event your Honor permits an amendment to the return even though the United States Attorney has not requested it. I urge upon your Honor that in the exercise of sound discretion that pending the filing of another return or if your Honor should decide, for instance, that the writ should issue rather than an order to show cause under the decisions which have been cited to your Honor, involving reviews or action by the Supreme Court, or the Ninth Circuit, your Honor certainly has jurisdiction, if you have any jurisdiction at all, to review the matter, to grant bail, interstiti-ally to grant bail until the issues can be squared away before the court.

While petitioner's counsel may be at fault, and I don't pass upon that, for the delays, but any delays which may

be forthcoming now would be by virtue of the nature of the return and I urge your Honor they be enlarged on bail until these matters can be disposed of.

After all, no matter the horrendous security risk they may appear to be to the Attorney General if they are enlarged on bail for a few days, until the matter can be heard again by the court, certainly no great harm can be envisaged as coming to the Government or the people of [fol. 63] the United States and it seems to me that that minimum privilege or right these petitioners ought to have and they ought not be penalized for the faults either of their attorney—and I am not saying there is any fault—or for the faults of the United States Attorney in the inadequacy of a return.

Mr. Porter: I would like to add to that just this, your Honor.

I have been advised informally, not yet in writing, but informally by the immigration service that they propose to hold a hearing in the case of my client, Mr. Carlson, on November 20th, less than two weeks from Friday.

That means obviously the necessity of conferring with my client in preparation for that matter.

It is so inconvenient as to be virtually impossible for me to confer with him while he is at Terminal Island and I am in my office in downtown Los Angeles during business hours, which are the hours that the Government permits visitation by counsel there.

It is impossible because of the obstacles interposed by the immigration service to visit my client out there at other hours, such as evenings and Sundays, as I found out last Sunday.

Now, I submit that Mr. Carlson's right to an adequate opportunity to prepare his defense, as well as my corollary [fol. 64] opportunity to advise with him in the preparation of his defense, is simply another reason why, as Mr. Wirin says, either pending further hearing, if the court deems that to be necessary, or pending appeal, that Mr. Carlson should be enlarged upon the bail which has been in effect for the past three years.

The Court: Counsel, if I were to fix bail in this matter, a new bail bond would have to be secured because there is a new warrant of arrest in this case.

Mr. Porter: Very well.

Mr. Wirin: We would agree to that.

Mr. Porter: I referred to that by way of amount rather than specific security.

Mr. Wirin: My suggestion was merely that this enlargement be very temporary, until these matters can be disposed of.

The Court: I am going into this very carefully and if I think the issues are not clearly drawn I am going to direct the issuance of a writ, but I want to tell you frankly it will be without bail.

I will say this, however, that I think the immigration officers owe it to these petitioners to make it possible to consult with their attorneys at reasonable times.

There were complaints made as to the condition last Sunday. We want to hurry these matters up and I don't think it is any credit to the Department, if it is true, the [fol. 65] way matters were handled last Sunday.

Mr. Binns: Your Honor, I made an investigation into that after the conference in chambers and find that they maintain normal business hours down there and during those business hours any attorney can consult with his client. However, the attorneys in this case have never found it opportune to go there during normal business hours, but have always wanted to use abnormal hours. However, the one who was able to get some one in authority was given special permission and arrangements were made for her to go down there on Sunday. However, your Honor, I don't feel that the Government should have to maintain 24-hour service seven days a week in the event an attorney wants to go down there.

The Court: I will say this, Mr. Binns, that if I issue a writ returnable at a future date because of technicalities, unless I can get the assurance that these people can have a full opportunity of conferring with their clients, I am going to grant bail so they will have that opportunity. Now, if you want to keep them in custody you are going to have to vary a little bit your ironclad rules, because I know from experience with the Immigration Department that they have a set of rules that they cannot deviate from or even be human, I know that. I know that from my experience in other cases.

Mr. Binns: In this case counsel have been free at all [fol. 66] times to interview their clients at any time they wanted to but you can't go down and talk to a uniformed guard with no responsibility, and insist that he do things.

Now, unfortunately, last weekend Mr. Landon was moving his home from one place to another and his telephone was cut off and they said he was hiding someplace. After all, he is working for the Government. On the weekends I think he is entitled to move. It was unfortunate that that occurred.

The Court: You have had enough experience right in your own office, as an Assistant United States Attorney, to know how ironclad they are in everything they do. They have a rule to go by and they won't vary one iota. And if visiting hours are from 10:00 to 12:00 and you stay one minute after 12:00 somebody comes along and throws you out. I know that.

I am trying to carry out what I think is the law in this case but at the same time I think arrangements should be made so these attorneys shouldn't have to take a half-day off from their office to go down to Terminal Island in order to spend a half-hour with their client. It wouldn't hurt if they were a little late or after hours.

Mr. Binns: I practiced law in San Pedro for four years and every time I wanted to see somebody in the jail I had to take a day off.

Mr. Porter: In the county jail attorneys get a pass which admits them to the jail at any reasonable hour, ex- [fol. 67] cept mealtime.

I asked Mr. Landon to give me a pass as an attorney to visit the Terminal Island jail but it was refused.

Mr. Landon insisted that I telephone him or his deputy every time I wanted to see my client other than the period from 9:00 to 5:00 on weekdays.

The Court: 9:00 to 5:00 is quite reasonable hours. I don't know why you should complain about that.

Mr. Porter: That is my working day.

The Court: You are working when you go down there, aren't you?

Mr. Porter: But I want the right to visit my client.

The Court: That is what you get paid for.

Mr. Porter: I want the right to see my client on Saturday and Sunday.

The Court: You haven't the right to see him in church.

Mr. Binns: Your Honor, Mr. Landon says that arrangements can be made for putting them in the county jail. The reason they weren't put there is because it is far more desirable at Terminal Island, so far as food, exercise, detention facilities and everything else. It is a farm at Terminal Island. It isn't a prison.

Now, if they want them brought up here to the county jail he will have to make the necessary arrangements.

The Court: Would you like them put up in the county jail? [fol. 68] Mr. Porter: No, your Honor. I want them available to be visited by me at any reasonable hour.

The Court: I think between 9:00 and 5:00 is reasonable.

Mr. Porter: It is not on a weekday, if your Honor please.

The Court: You can't expect them to bring your client up to your office. I don't think you have a right to expect that.

Mr. Porter: I don't expect that but I want the right to visit them in the evening, if necessary, and at reasonable hours on Saturday and Sunday.

The Court: I think 9:00 to 5:00 is reasonable and any other arrangements should be made with Mr. Landon.

They have indicated here a willingness to cooperate. If you want your men over in the county jail where you only have to go that far they will accommodate you to that extent. What more do you want?

Mr. Porter: I want the men free.

The Court: Sure, I know what you want.

Mr. Porter: And I don't think it is a subject for flippance, if your Honor please.

Now, I would like to say one more thing, if I may. I think that in the light of previous comments of your Honor that the most logical basis for disposing of this matter, in order to get an expeditious decision on it, is that your Honor rule in the case of Carlson now on the merits. We will waive the matter of the writ for that purpose. We [fol. 69] submit on the present record and we ask that your Honor rule on the merits at the earliest possible time so that we may take whatever steps may be open to us.

The Court: Well, I am going to rule when I get ready, and after I have had an opportunity to read these cases

you submitted this morning. I may direct the issuance of a writ so that the United States Attorney can make a more complete return. You people have been playing. You talk about flippancy. I think I have taken about as much as is necessary for me to take from counsel. I have had a first-class lecture or two this morning from counsel. I have appreciated it but it hasn't changed my viewpoint. At the same time, if you think you can rush me into a decision until I am ready, why, you just try it. I think I told you once before of my attempt to hurry a judge in making a decision before he was ready and I was nearly thrown out of his courtroom. I have a very vivid recollection of that experience and it is still one of my favorite stories.

You have cited a number of cases to me this morning and I am going to read those cases.

Miss Rosenberg: For the record, I would like the motion made by Mr. Porter in the Carlson case to be deemed my motion on behalf of my client.

The Court: Have you filed one?

[fol. 70] Miss Rosenberg: No, I have not.

The Court: When you file it I will accept it. You have been very technical this morning and very critical of the court so I am going to require you, if you want to make a motion, to file such motion.

Miss Rosenberg: Very good, your Honor.

The Court: How about you gentlemen? Do you want anything else?

Mr. Wirin: Just want the men out on bail.

The Court: As a friend of the court?

Mr. Wirin: Just the men out on bail.

The Court: Is there anything else? Have you anything further to offer?

Mr. Tyre: I am sorry, I was conferring with Mr. Landon briefly about transportation when Mr. Porter's last remarks were made.

The Court: Do you want your client brought up to the county jail?

Mr. Tyre: No, I was trying to make arrangements to have them brought up here.

The Court: I requested the parties be here this morning. I presume they are here.

Mr. Tyre: I think we can work it out.

The Court: I thought they would be here early so counsel would have an opportunity to consult with them.

[fol. 71] Mr. Binns: We brought them up yesterday.

Mr. Tyre: I think that can be worked out.

Mr. Porter: It was a great accommodation.

Mr. Tyre: That wasn't the point I wanted to make. The point I wanted to make was this: I agree with your Honor we might as well get down to the issues quickly and as far as the Hyun case is concerned, I am willing to have this hearing here deemed to be the return on the order to show cause—in other words, rather than have this taken as the original hearing on the application itself, it is as though the writ had been issued and this is now the return date and we have before us the return and the traverse and the petition, so that we don't have to, if your Honor should see fit to issue the writ, come back a week later and I presume be in precisely the same situation.

The Court: There is only one reason why I am taking it under submission. You have contended that the return is insufficient to raise any issue to be heard by this court, and these cases have been cited in support of that contention, and I want to determine whether that is true or not.

I am willing when you get down to the point where you will say that there is an issue as to whether or not the petitioners in this case—whether or not the burden is upon them to show an abuse of discretion, I am willing and ready to rule, but you claim and contend that there is a defect in the return that does not raise any issue upon which [fol. 72] evidence is required. In other words, you have filed a general demurrer or a motion for judgment on the pleadings, you might call it, and I am going to determine that point and if it comes down to that point I will make a ruling. But I am going to tell you as I told you before, that I am going to allow the Government an opportunity to amend their return if I see fit. So when you come right down to it you are wasting your time and the time of these people because if I am wrong you can get them out of jail a whole lot quicker if you will join issues with me.

Mr. Wirin: May I have another word?

The Court: Yes.

Mr. Wirin: Your Honor has said, and I agree entirely, that your Honor is not concerned with technicalities, and that you give counsel ample opportunity to amend pleadings so that the issues can come foursquare before the court, I accept that, but in this situation, your Honor, the lawyers for the respondents—not one of them, but a group of them, the most skillful lawyers in the United States Attorney's office upstairs—have said to your Honor that they are satisfied with their return and they do not ask leave of court to amend.

Now, I would respectfully suggest that that ought to be sufficient to the court.

The Court: I know them well enough but I don't take a [fol. 73] lawyer's word for anything, not even your word or anyone's as far as the law is concerned, because that is my responsibility. That is my responsibility just like they contended here I didn't have any discretion in the matter. That was their original position and I accepted your interpretation of the law.

Mr. Wirin: But they are not asking leave of this court to amend.

The Court: Well, I may give them an opportunity to. That very often happens in a motion to dismiss for failure to state a cause of action.

Mr. Wirin: That might be a reflection on Mr. Landon's counsel.

The Court: I am not afraid about reflection on his counsel. That is not the question. I want to get this case fairly and squarely before the Circuit Court and I don't want it to go off on some technical tangent.

You gentlemen can get a ruling from me this afternoon if you will get together and stipulate as to what the issues are. As I understand it, the issue is whether or not under a petition for a writ of habeas corpus, whether you have to assume the burden of establishing abuse of discretion by the Attorney General. Now, that is the real question involved.

Mr. Wirin: Your Honor has ruled on that.

The Court: But you claim that the papers are not suf- [fol. 74] ficient to raise that issue.

Mr. Porter: That is right.

The Court: So I am going to determine that myself and

you might as well get together and agree upon the issue and let me rule.

Mr. Wirin: But, Judge, the United States Attorney has told you that they are satisfied with their return and there is nothing for us to stipulate about. In other words, should we try to induce them to change their mind when they have announced to the court for the record that their return is adequate.

The Court: I take this position, that neither this court nor any of counsel know it all. That applies to you and it applies to Mr. Binns and it applies to me. And you have cited a number of cases here and he tells me that he doesn't even want to read those cases to determine whether his return is sufficient. When he does that I say he is going off half-cocked.

The matter will stand submitted.

(Whereupon, at 12:10 o'clock p. m., the above-entitled matter was concluded.)

[fol. 75] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE BEN HARRISON, Judge Presiding

No. 12491-BH—Civil

In Re: FRANK CARLSON, also known as SOLOMON SKOLNICK

No. 12492-BH—Civil

In re: MIRIAM CHRISTINE STEVENSON, etc.

No. 12503-BH—Civil

In re: HARRY CARLISLE, also known as HARRY CARLYLE

No. 12505-BH—Civil

In re: DAVID HYUN

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

January 5, 1951

[fol. 2] APPEARANCES:

For the Government: Ernest A. Tolin, United States Attorney, Los Angeles 12, California; by Walter S. Binns, Assistant United States Attorney.

For Carlson: Margolis & McTernan, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California; by John W. Porter, Esq.

For Stevenson: Rose S. Rosenberg, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California.

For Carlisle: Stanley Fleishman, Esq., 1614 North Argyle, Los Angeles, California.

For Hyun: Milton S. Tyre, Esq., 902 Quinby Building, 650 South Grand Avenue, Los Angeles, California.

[fol. 3] Los Angeles, California, Friday, January 5, 1951. 10:00 A.M.

The Court: You may proceed.

The Clerk: 12491 In Re: Frank Carlson.

12492, In Re: Miriam Christine Stevenson.

12503, In Re: Harry Carlisle.

12505, In Re: David Hyun. For hearing on return of writ.

The Court: Whose first move is it?

Mr. Porter: The petitioners are ready, your Honor.

Mr. Binns: We haven't received a copy of the traverse, your Honor. We haven't seen any answer to our return.

Mr. Porter: The respondent's returns to the writs issued by the court last week were served upon counsel for the petitioners at about 2:00 o'clock yesterday afternoon, your Honor.

Our time problem was very severe, therefore, and I would like at this time to propose a stipulation to the Government that the petition for the writ be deemed to be a traverse to the return.

Mr. Binns: Your Honor, I always hesitate to reject stipulations but I have the feeling, having argued this matter before in the Circuit Court, that the fact that the Government was obliging and consented to all stipulation of counsel and in some manner confused the Circuit Court of Appeals—if your notice there is comment in the opinion to the effect that it having been stipulated "we feel that certain things flow."

[fol. 4] I realize that counsel has had very little time and probably has not had time to properly pursue our return, but I feel I also should have time to look at the traverse because of that language in there which puts the burden on me of denying allegations in the traverse and I don't know how I can deny something that I haven't seen.

The Court: Section 2248 of Title 28 provides as follows:

> "The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."

You are in that situation. I appreciate counsel hasn't had time to answer these long returns and affidavits. I am

fully cognizant of that. But apparently it is going to be necessary to make some some traverse to protect yourselves.

Mr. Porter: May I suggest this, your Honor, that we proceed with the hearing and I shall request leave to file a traverse if we should be so advised before the end of the day today, to file and serve it.

In order to reassure Mr. Binns on that point I would say that any traverse which would be filed by me in the Carlson case at least, would do no more than refer to the allegations of the petition and incorporate them by reference.

[fol. 5] The Court: I think we got into trouble before by not proceeding in the regular course and I think so there will be no question this time about the sufficiency of the pleadings, that a traverse should be filed before we proceed.

I hadn't thought of it in that light but I think the traverse should be filed and then the Circuit Court will have to find something else this time to find fault with.

Mr. Porter: May I suggest then, your Honor, that if it is convenient to your Honor's calendar the matter go over until 2:00 o'clock so we may file a traverse this morning.

The Court: Yes, it can go over until 2:00 o'clock this afternoon. I haven't any objection to that, or I will put it over until next week.

Mr. Porter: We are most anxious to proceed today.

The Court: Well, I am perfectly willing to do anything in order to get this matter in shape so the Circuit Court can act if either side here is dissatisfied with this court's ruling.

I might state, in view of this decision which you called to my attention yesterday afternoon and which I read this morning—I haven't had an opportunity to fully analyze it and consequently I am not going to rule on this case today. I am going to give it further study in the light of the decision of the Ninth Circuit in the cases involved. If there is any variance in the Seattle case and this case I would like [fol. 6] to ascertain that.

Counsel also advised me that there was a decision from Judge Bowen and affidavits in that case that they wanted to submit which they expected to have by special delivery. In any event I want the affidavits upon which the Seattle case was decided.

In addition to that you haven't any objection to going ahead except may I ask this, has the Government anything additional to submit other than their return?

Mr. Binns: Yes, your Honor. You mean in the way of authorities?

The Court: No, I mean evidence.

Mr. Binns: We feel when that point comes we will, your Honor. However, we feel that our affidavits are complete for the purpose of this hearing. We take the position, your Honor, that the burden is still on the petitioners.

The Court: May I ask, Mr. Porter, are you going to submit any counter-affidavits to the affidavits and return of the Director?

Mr. Porter: I don't see any occasion to do so, your Honor, with the possible exception of one point which to me is extremely minor and perhaps not even material, although on that I may differ with the Court of Appeals, and that point is raised in the return in one of the concluding paragraphs, paragraph 13 in the Carlson case, alleging delay at the [fol. 7] hearings under the warrant before the immigration service.

With the exception of that allegation, which is also referred to in the Director's affidavit, which lists the dates of certain hearings in the Carlson case and refers to motions for continuances which were made by counsel in that case, all of the matters alleged in the return, looking at that for a moment separately from the affidavit, are matters peculiarly within the Director's knowledge and that is susceptible of traverse by the petitioner.

So far as the affidavit itself is concerned it is my belief that it is wholly insufficient under the rules of the Court of Appeals in the two cases, or the five cases, perhaps I should say, and it is not our intention to file counter-affidavits in response to that for the reason, first, that we think that when it is boiled down there is nothing in the affidavit except a naked assertion that the petitioner is presently an active member of the Communist Party.

We think, secondly, that such a showing is totally insufficient under the law of the case.

The Court: Doesn't the affidavit go further than that? Doesn't it show his activities?

Mr. Porter: I think not, your Honor. The affidavit in the Carlson case—for example, there are some differences among them but this is, I think, typical enough. It states—well, it breaks down into three groups of statements as I [fol. 8] analyze it. First, a group of alleged admissions in

the past of past membership in the Communist Party of the United States and in the Young Communists League.

There is reference to an admission on an unstated date as to membership in the Young Communists League. A 1945 admission as to membership in the Communist Party and a reference to an article in the Daily People's World in 1949, containing a statement that he was a member or that he was a member of the Communist Party, and a reference to an article in the same newspaper in November 1950 containing a similar quotation with reference to past conditions.

That is one group of statements.

Then there is the group of statements with reference to offices or positions held; a statement that the petitioner was editor of the Young Worker at some unstated period in the past; that he was a member of a national executive committee of the Young Communists League at sometime in the past. That he was secretary and president of the Young Communists League in California at sometime in the past.

That in 1946 and part of 1947 he was state secretary of the Communist Party for the State of Wisconsin.

That in 1949 he headed a Marcus (phonetic) institute in Los Angeles, whatever that means. No explanation is given as to that. And then the totally irrelevant assertion that in 1950 he attended a meeting of the Civil Rights Con-
[fol. 9] gress in Los Angeles.

Now, that is all there is in the affidavit, your Honor.

The Court: Do you consider there is any inference to be drawn from the fact that he refused to answer questions concerning his membership in the Communist Party?

Mr. Porter: Categorically not, your Honor, for two main reasons. First, that it is familiar law that no inference may be drawn as to the fact when the privilege against self-incrimination is claimed. That is familiar law as I know it is to your Honor and the reason for it is apparent because to say otherwise is to say that the privilege can be limited, qualified or indeed done away with if inferences are to be drawn.

The Court: But this is a situation where another rule applies. Where information is withheld an inference can be drawn from that, particularly in a civil action. For instance you have better evidence than anybody else and if

you withhold that information an inference may be drawn from that. This is a civil proceeding.

Mr. Porter: I recognize the rule to which your Honor refers and my answer to that is this: The second point I was going to make is that no logical inference which is worth anything as evidence, can be drawn from such a claim or refusal to answer under these circumstances, because who can say upon what the claim was based or upon [fol. 10] what the refusal was based. It might have been based upon present membership. It might have been based upon membership in 1949.

The Court: But suppose the court were to call the petitioner to the stand and ask him the question whether he was presently a member of the Communist Party and he refused to answer, and I assume he would in view of this affidavit, could any inference be drawn from that?

Mr. Porter: I think the court would not be properly entitled to draw any inference from it, your Honor.

The Court: I am interested in that particular point.

You will recall I had another case in which a person refused to answer whether he was a member of the Communist Party in 1936 and the court held that an inference might be drawn from that that he was still a member.

Mr. Porter: I am not familiar with that case, your Honor, but my point is that, even assuming the propriety of drawing inferences, the inference of present membership is not the only logical inference to be drawn, that an equal logical inference is membership at sometime in the past—at any time in the past.

The Court: The specific question was:

> "At the time this warrant of arrest was served upon you were you a member of the Communist Party"

Assume for the sake of argument that he refused to answer and the Director in his affidavit says that he is an [fol. 11] active member of the Communist Party, what kind of finding would a court be compelled to make?

Mr. Porter: It seems to me that in that situation—let us suppose that he did answer the question and his answer was "no", then the subject would have been opened up and the examiner——

The Court: Then there would be a conflict. As far as

this court is concerned there would be a conflict in the evidence, wouldn't there?

Mr. Porter: Yes, but more than that the opening up of that subject would then have possibly led to an examination as to past membership, a situation which could be just as logically inferred from the claim of privilege to the first question as could the inference of present membership.

Again my point is that there is no logical compulsion.

So far as the civil action is concerned, if it were not for the Smith Act he could be compelled to answer the question. In other words in the deportation hearing or this type of hearing that would be a proper question if it would not subject him to possible criminal prosecution.

Mr. Porter: Yes.

The Court: So, so far as these proceedings are concerned, if it were not for the Smith Act, he could be compelled to answer. If it were not for the Smith Act it wouldn't be an offense to be a member of the so-called Communist Party.

[fol. 12] Mr. Porter: The Smith Act and now the McCaran law.

The Court: Well, the McCaran Act supplements the Smith Act.

Mr. Porter: Yes, I think that is the law but I still——

The Court: We are here trying a civil case and the natural reason for denying membership would be to protect themselves from any criminal prosecution of any kind.

Mr. Porter: That is correct, that is correct, but whatever his reasons are—whatever the motivation is doesn't help us at all in determining what logical inference is to be drawn from the refusal to answer and I still find it impossible to see how such a claim or refusal points any more in the direction of the present than it does in the direction of the past.

But, of course, basically, as I think your Honor has probably already cleared, our position is whether the showing of present membership or past membership or any membership, the showing is insufficient under the tests laid down by the court of appeals.

The Court: I take the position that it is only present membership and if there were no present activity there wouldn't be any question in this case and bail would be proper.

The likelihood of these people leaving the jurisdiction of

the court is not the point at issue. Is that not true, Mr. Binns?

[fol. 13] Mr. Binns: That is correct.

The Court: You claim that under the McCaran Act these people present a security risk by being at large.

Mr. Binns: Not specifically under the McCaran Act. We feel under the general immigration laws, of which the McCaran law is only an amendment——

The Court: The McCaran Act extended Section 156. It clarified that section so there is no argument about the right of taking people into custody.

Mr. Binns: That is correct.

The Court: And your new warrant was issued by virtue of the power given to you under the McCaran Act, if I remember correctly.

Mr. Binns: Your Honor, on this question of using a refusal to answer, we have the case that I think your Honor has previously had cited, but whether you have or not I am not certain, Bilokumsky v. Tod, 263 U. S., 149.

They have a discussion there, your Honor, of a deportee standing mute.

Your Honor, if counsel is going to get these papers prepared by 2:00 o'clock, and I know him very well, he will talk until then——

The Court: Well, I thought he was going to talk just so long anyhow and I might as well listen to him now and let him get it out of his system as to listen to it later today [fol. 14] and be tied up with traffic this afternoon. I know he is going to talk just so long.

Mr. Porter: I have been answering your Honor's questions so far.

The Court: I realize that. I mean nothing by such remarks.

Mr. Porter: I just wanted to add this one further comment relative to your Honor's last remark.

You said in effect, as I recall, that if it were just a question of past membership rather than present activity you would feel that they were clearly entitled to bail.

The Court: In other words I would take the position, while it might be grounds for deportation to show that a man, for example, was a member of the Communist Party in 1936, unless there was some evidence to show that that

membership was continued or his activities as a Communist continued, I wouldn't hesitate in granting him bail.

The only question that is bothering me is this, frankly. The President says we are not at war, but American boys are being compelled to go into the army and are being killed by Communists in Korea. Those boys are compelled to enter the service by reason of their citizenship while people who are not citizens and who are members of the Communist Party—alleged to be members of the Communist Party and active in that organization in this country [fol. 15] and within our own ranks and have as their objective the destruction of the things that the boys in Korea are fighting for, and yet the Circuit Court, and I am not speaking disrespectfully of the Circuit Court because I have high respect for the integrity and loyalty of the gentlemen who were involved in this proceeding, yet they don't give me any direct outline upon which I may proceed—that is I haven't been able to fathom the two decisions completely and I don't know just how far and what the Director has to show here. I am not clear. He states in his affidavit that they are present members of the Communist Party. It is my duty to turn these people loose to continue as active members of the Communist Party in our community. That is the thing that is bothering me.

Mr. Porter: Your Honor, the question in our opinion is not whether they are present or past active members of the Communist Party or any other organization, but whether the Director can show that they have done anything which justifies his conclusion that they are security risks.

The Court: It is your claim that it is incumbent on the Government to show some specific act of, you might say, of disloyalty? These people don't owe any loyalty to this country. They don't owe allegiance to this country. They are aliens. They don't owe this country anything.

Mr. Porter: That is a debatable point, particularly with respect to someone like Mr. Carlson, for example, who [fol. 16] has been here since he was the age of 7 years and knows no other home.

The Court: Yes, but he is an alien. He has not taken any oath of allegiance to this country.

Mr. Porter: Why? Because the Government hasn't allowed him to, your Honor. There is an undenied allega-

tion in our petition that he filed a petition for naturalization seeking to become a citizen of this country.

The Court: I realize that.

Mr. Porter: And he has been prevented from doing so only by the action of the immigration and naturalization service.

Now if these people by virtue of present active membership or whatever the Government chooses to call it, have done things, have taken part in activities which would lead a reasonable man to conclude that their liberty would constitute a threat to anybody or anything or any state of order, then the Government can just as well come forward and say so and say what those activities are. But the Government hasn't done it and there is just one reason it hasn't done it and that is because they can't do it. All they can do is point again and again and again and again ad nauseam to the findings of the McCaran law to bolster up their case when those findings don't even support their conclusion and it boils down, if your Honor please, to a question as to whether the individual petitioner—the petitioner, not a class of people whom the Government dis- [fol. 17] approves of for various reasons, but whether the petitioner is a bad security risk, whatever that means. And the Government hasn't advanced a single fact. It hasn't even advanced a conclusion, if your Honor please, except the secondary conclusion that because they are alleged to be present active members of the Communist Party, which is alleged to be a world conspiracy—a world conspiratorial movement, et cetera, et cetera, et cetera, and that these petitioners might at some future time engage in some kind of activity which would be inimical to public security. That is a conclusion upon a conclusion upon a conclusion so again we are in the same boat exactly, if your Honor please, as we were when we were here before.

The Court: Your point is this, as I stated before, it is your interpretation of these decisions that it is essential that the Government set forth some specific act from which the natural inference would flow that they are participating in unlawful activities.

Mr. Porter: That is correct, that is correct, and that position is closely analogous to the position of the Supreme Court in the DeJonge case which involved a quite similar question.

Our position is that this is a question of showing as to individuals and that mere classification, lumping people into categories by way of conclusions, as has been done here, establishes nothing whatever except that the action [fol. 18] of the Director was arbitrary.

The Court: Do you want to take a recess until 2:00 o'clock so you may file your traverse?

Mr. Porter: May I ask this, your Honor, that we have a five or ten minute recess so counsel and I may discuss the problem..

I am not even satisfied, as I say, that any traverse is necessary under the pleadings as they now stand and perhaps we can save that time.

The Court: And I will read this decision while you are talking among yourselves.

Mr. Porter: May we retire, your Honor?

The Court: Yes. We will recess for 10 minutes.

(Short recess)

Mr. Porter: If your Honor please, we would like to have until 2:00 o'clock in order to prepare a traverse so that the record will be completely clear.

Now in order that the Government may know what to expect from it I would like to state that the essence of what it will contain because, as I have said, we are most anxious to proceed with the hearing today for obvious reasons.

In each case it is our thought that the traverse would refer to and incorporate by reference and re-allege all of the allegations of the respective petitions.

In two or three of the cases the traverse may attack the [fol. 19] allegation of undue delay in the deportation hearings on the part of the petitioner or counsel.

The Court: They are here. Call them as witnesses and find out what the facts are.

Mr. Porter: And in one case, the Carlisle case, there are erroneous allegations in the return with reference to prior administrative proceedings which it may be desirable to correct in the traverse.

That is all that there will be in the traverse. None of the other allegations of the return will be controverted and no counter-affidavits are expected to be filed unless it be on this question of delay which I mentioned before.

It may be also that if time and human skill permit we may wish to make motions—file motions to strike portions of the return which we believe to be insufficient as a matter of pleading.

The Court: I might ask if you have the record of these continuances present and someone who can testify to the facts, if that is going to be in dispute, as to the various continuances. The Circuit Court seems to be interested in the delay of hearings in three of these cases.

Mr. Binns: I wanted to ascertain, your Honor, if they happened to be Los Angeles hearing officers and I am informed that they are.

The Court: Very well. The hearings were set for Los [fol. 20] Angeles, were they not?

Mr. Binns: Yes, but sometimes they bring in men from other districts.

The Court: But you have the record?

Mr. Binns: Yes, and they say they are available and they can have them here.

The Court: They are records kept in the regular course of business. They are a part of the Government records in these proceedings and they will be admissible to establish what the facts were if there is any dispute as to the various continuances at the request of counsel, and if it is a local hearing officer he should be present.

Mr. Binns: We will have them here, your Honor.

The Court: All right, we will take the recess until 2:00 o'clock.

I want to say this, I am going to adjourn at 4:00 o'clock and I suggest you arrange your hearing accordingly and your speeches accordingly. I am only going to spend two hours this afternoon on this hearing. We will recess until 2:00 o'clock.

(Whereupon at 11:00 o'clock a.m. a recess was had until 2:00 o'clock p.m. of the same day.)

[fol. 21] Los Angeles, California, January 5, 1951
2:00 P.M.

The Court: Now where are we, gentlemen?

Mr. Binns: We are ready, your Honor.

The Court: Mr. Binns, I am inclined to believe at this time that there is some support to Mr. Porter's position

that there has been no specific facts alleged in the affidavit. There are some in Mr. Carlson's case but in the other three cases there is no allegation that they are presently members of the Communist Party or of any of the other organizations. Nor is there any allegation that they are participating in any present activities that would endanger the public safety.

Mr. Binns: If you will notice, your Honor, in the return——

The Court: I noticed the allegations in the return but I also noticed that they are based upon information.

There is an allegation that the representative of the Attorney General in Washington made certain determinations, but the affidavit that supports the return as to three of these petitioners does not make any statement as to present activities.

In other words, take in the Carlson case, it does mention the fact of some act of his on November 10th of this year, but that is the only one that has any statement of fact as to activities. Take the case of David Hyun. That recites his activities in 1946 and 1947 and says he was educational director of the Westlake Section of the Communist Party [fol. 22] in Los Angeles, California in 1949.

Now, there is nothing in there to show that he was. It doesn't indicate that he is at present nor that he is engaged in any activities.

Mr. Binns: That is correct, your Honor. However, we are in this position, your Honor. They just served me with this traverse and I am concerned about the language in the Circuit Court decision which seemingly puts the burden on the Government of denying everything specifically that we don't want to admit.

Now, I have hurriedly read through these four traverses and I think there is some matter specifically in the Carlson one that we will want to deny, but each of them incorporates by reference the entire petition originally filed and there is definitely matter in those petitions that we want to deny, your Honor, in view of the circumstances.

The Court: Shouldn't they be denied in your return?

Mr. Binns: I don't think they could have been even as late as this morning. Mr. Porter wasn't sure what he was going to put in his traverse and I depended, when we went

to the circuit before, upon the fact by inference we have denied.

The Court: Here is the situation. You had an opportunity to take this case to the Circuit Court and now you are back with a mandate directing me to do certain things. If there is any confusion it is the fault of the Department of Justice, if there is any fault any place. If other words [fol. 23] you have accepted the Circuit Court's ruling and then you come here and want to argue with me about it. You had your remedy. I can't correct the Circuit Court's decision. There is only one place to do that.

The trouble is the Department comes along and throws some people into jail and makes big headlines out of it and when we get all through they will say:

"Oh, well, the court turned them loose."

That is their alibi for it.

Why don't you do what the Circuit Court tells you to do or take it to the Supreme Court and show your good faith. Show that you mean business when you put the people in jail.

Mr. Binns: Your Honor, I feel that the return we filed was filed in good faith and if it wasn't for the language in the Circuit Court's opinion saying that we have to specifically deny everything in the traverse that we don't like, I would be content to rest on the pleadings as they are now, but with that language in there I feel that the Government is entitled to specifically deny everything in these traverses that we don't agree with.

The Court: There is only one affidavit that comes anywhere near, and I am not sure that it comes within the Second Circuit's decision. I am sorry that I haven't been able to have the affidavits which were filed in the Seattle case in which the Circuit Court reversed and remanded. [fol. 24] If I had it I would have an opportunity to compare it.

Do any of you gentlemen have a copy of it or do you know where we can get a copy?

Mr. Porter: I don't have an answer to that, your Honor, short of the clerk's office in the court of appeals.

I do now have a copy of the affidavit filed before Judge Bowen after the remand in Seattle.

The Court: That is not binding upon me, counsel.

The decision in the Seattle case indicates an affidavit which on the face of it is quite similar to the one involved here. If that is true there is nothing more to do about it. That is all. I will have to grant the writ. That is all there is to it.

Of course I presume the Government should have an opportunity to answer this traverse which puts in issue a number of facts. That will have to be heard.

Mr. Porter: Well, I think that is not the case as far as the Carlson case is concerned, your Honor. We demur generally, of course, to the Government's return and we attack in turn certain facts which were also set forth both in the petition and in the return with reference to the calendaring and processing of the administrative hearings commencing in the Carlson case with the original arrest on November 3rd, 1947 and continuing on up through the hearings which have been held in the last few weeks.

[fol. 25] Now, there is no issue of fact tendered here by the traverse in this case and so far as an opportunity for the Government to reply is concerned, the rule of course is in the statute, that the allegations of the traverse which are not contradicted otherwise are deemed denied.

The Court: But they have a right to an opportunity to contradict them.

Mr. Porter: It is automatic and there is no issue of fact tendered by our traverse.

The Court: Well. I presume it is Mrs. Stevenson.

Mr. Porter: Yes.

The Court: Harry Carlisle and David Hyun. There is nothing in the affidavit to show they represent a present danger to the national security.

Mr. Binns: I disagree with the court on that.

The Court: I am going to give you an opportunity to answer the traverse. I shall give you an opportunity to file an affidavit with specific facts upon which the court can act.

Mr. Porter: I would like to record an exception and objection to the court's ruling in this respect, your Honor, upon the ground that the Government has had two chances now. It has had since the 21st day of October 1950, almost three months, in which to come forward, if it could, with some rational factual basis for the action which it has taken against these four people, and I submit there must

[fol. 26] be an end to litigation and that the Government ——

The Court: This court is just as anxious to get through with this as you are.

Mr. Porter: I don't question that, your Honor, and I think that this is the time when it should be brought to an end, if your Honor please.

The Court: The only thing is this, counsel. This morning you wanted until 2:00 o'clock to prepare your traverse. I gave you that opportunity ——

Mr. Porter: We didn't want it, your Honor, if I may recall.

The Court: You asked for a stipulation and counsel wouldn't stipulate.

Mr. Porter: That is right, and that is the customary procedure.

The Court: And you have raised a point this morning that hadn't been specifically called to my attention before, and to which I think considerable weight should be given, and that is whether or not they have to set forth specific facts from which an inference could be drawn that they are security risks.

Now you argued this morning the mere fact that they were Communists or might have been was not sufficient upon which to deny bail.

There is only one affidavit here, and that concerns your [fol. 27] client, which comes anywhere near meeting that requirement. Have the allegations in Mr. Carlson's case been denied?

Mr. Porter: Neither admitted nor denied.

The Court: It stands admitted if it hasn't been denied, doesn't it?

Mr. Porter: That is the position the respondent takes, your Honor.

The Court: Answer that question.

Mr. Porter: As a matter of law ——

The Court: Answer that question. If it isn't denied it is admitted.

Mr. Porter: I can't recall the rule. Let us assume it was admitted. I am perfectly willing to assume as a matter of law it is admitted without reaching the question of these specific facts at all. The point that we make is that this thing doesn't come anywhere near to making a showing

of a reason for holding this man in jail. All it does show, if it shows anything at all, is that on the basis of a bunch of hearsay fortified by a conclusion which your Honor has read, that the petitioner is well known—to whom, by whom, when? As an "educator and leader in the Communist Party".

The Court: I am willing to call Mr. Carlson as the court's witness and question him about these things.

Mr. Porter: That brings me to the situation in a case in Cleveland, your Honor, before Judge Freed where, I am [fol. 28] informed, the court did that. The petitioners declined to take the stand or to answer questions on the basis of the same legal position which we are advancing here and the judge thereupon granted the writ and discharged the prisoners on their bond.

Now this business about the article in the Daily People's World of November 10, 1950 isn't worth the paper it is written on for at least two reasons. One is it is a protected activity. It is the same kind of thing as the Government showed in the Williamson case against the leaflers of the Communist Party and Justice Douglas said that is protected under the First Amendment and, in the second place, all it says is, assuming that this is an accurate quotation:

"I told them I am a Communist"

When did he tell them? Whom did he tell? At what time? At what period? With respect to what period of time?

You can't tell from that and it doesn't begin to establish present membership.

The Court: I don't know whether the Government is going to stand on its affidavit or going to desire to file additional affidavits. I don't know.

There are certain facts that you say you have alleged as true and I stated before I have assumed that the only reason that these people are being detained is because of the allegation of a security risk. In other words, that there is [fol. 29] nothing here to indicate the Government is fearful that they are going to leave the jurisdiction.

Mr. Porter: I understand that is stipulated.

Mr. Binns: It is not stipulated.

Mr. Porter: It is an undenied allegation of the petition and under the opinion of the court of appeals it is admitted.

Mr. Binns: That is why I want time ——

Mr. Porter: It is too late.

The Court: Nothing is too late.

Mr. Porter: Under the mandate of the court as I read it, your Honor ——

The Court: They didn't tell me when I had to have this hearing or when I had to decide it.

Mr. Porter: I refer to the language, if your Honor please, in which the court says there is no denial of petitioner's allegations as to residence, family status and so on and quotes from the Whitten vs. Tomlinson case which I cited to your Honor on the previous hearing which says:

"And these allegations must be taken as true."

Now, the Government has had an opportunity in its return before and its return today to deny what it wanted to deny and to come forward with facts if it could. The Government has failed on each occasion. It has failed in the face of specific guidance from the court of appeals in its opinion in two cases and there is just one reason, your [fol. 30] Honor, and that is because they can't. It is because the facts don't exist.

The Court: If they don't exist then you don't have to worry about it.

Mr. Porter: The Government is asking, your Honor, to hold that a person can be thrown into prison and held there indefinitely pending deportation proceedings because he is a member of the Communist Party and that, we submit is completely outside the law and contrary to everything that we know about our Constitution.

The Court: I am inclined to go along with you but I am not inclined to the extent yet that I am ready to make a ruling because I have a feeling that your position in that respect may be true—that a person may be a Communist but unless they can show some activity I think your position may be correct.

The first time that point impressed me was this morning and that caused me to go back and re-examine the affidavits.

Mr. Porter: Would your Honor do this? I would like to make a suggestion, if I may. If the Government is to have time to file additional affidavits or documents will your Honor not, as a condition of granting this permission, and a reasonable condition, order that pending the filing and any further hearing thereon these petitioners be released

upon their bond with the understanding that they are to [fol. 31] appear at the continued hearing for such disposition as the court may then determine.

The Court: No, I am not going to grant any bail. I am going to hold the matter in status quo.

I feel if these people are security risks that they should not be released until I am satisfied there has been an abuse of discretion. I am not going to release them. I am simply going to follow the mandate of the circuit court. I am not going to grant Government counsel very much time.

There is one point I would like to have some authorities on and that is the question whether or not a refusal to testify may be the basis for an inference to be drawn. One case was cited this morning from the United States Supreme Court. I have never had occasion to run that question down and I would like the benefit of points and authorities from both sides on that question.

I shall not decide this case today in any event. I want to decide it on its merits like I thought I was doing before, but the Circuit Court says I was wrong and when three men say you are wrong I guess you are.

Mr. Porter: May I be heard on the showing made by the Government up to this time, your Honor?

The Court: Do you at this time request an opportunity to file additional affidavits, Mr. Binns?

Mr. Binns: Your Honor, we request at this time a con- [fol. 32] tinuance in order that we can meet head-on the allegations of the traverse and I still submit, your Honor, that once we have prepared a return in accordance with the decision of the Circuit Court the burden is still on the petitioners.

The Court: Well, as I read the Circuit Court's decision, which you people have accepted, that the burden is upon you, to show probable cause why these people shouldn't be released on bail—you have gotten yourself into that position and I think that is what those two decisions mean. In other words, the Seattle decision refers to evidence like in a preliminary hearing. And then another thing is I don't think that the allegation that a person was a Communist in 1947 means he is a security risk in 1950 or 1951.

Mr. Binns: Your Honor, we could hardly prove any activities against these people in 1951. They have been in custody.

The Court: Of course we know they haven't been a security risk for the last three weeks.

In any event I don't think three of the affidavits are sufficient under the circuit court's ruling.

Mr. Binns: In asking you for a continuance I am not conceding that. The trouble is I tried to oblige counsel in the last hearing and I did, to the point which set a world's record in getting to the Circuit Court of Appeals. This time when we go to the Circuit Court of Appeals I don't [fol. 33] want any criticism of the record. I want to be up there on the merits, and not on any statement that the Government should have denied this or that and, your Honor, we just got served with these at 2:00 o'clock and I feel it is only fair and just that we be given time to consider them and amend our return to meet it squarely and I renew our request for a continuance at this time.

Mr. Fleishman: On behalf of the petitioner Carlisle I would like to say a word in amplification of what Mr. Porter and your Honor said, and that is so far as the petitioner Carlisle is concerned there is nothing in the affidavit at all which would in any way show that he was a bad security risk, and there is no reason why he should be—the Government should now be given another opportunity to file additional affidavits, if they can, and I don't think they can because they have done everything they can, but Mr. Binns is in no position now to say he is faced for the first time now with answering the allegations in our petition.

The mandate which was spread on the record 10 days ago told the Government to accept as true those undenied allegations under the original case and then to come forward with anything that they may have, if they have anything. Now, he wasn't surprised today. He couldn't have been surprised today because it was 10 days ago when he was told what was expected of him.

[fol. 34] If there was anything in the original petition that he didn't like he had his opportunity in the 10 days since the mandate was spread on the record to say so.

Now, insofar as the petitioner Carlisle is concerned, the traverse has absolutely nothing new. It re-alleges each and every paragraph of the original petition and the supplement thereto and then paragraph 2 says that deportation proceedings take a longer period of time, which is a matter of judicial notice, and that is all.

Now, on the original hearing, if your Honor recalls, this question was raised whether their return was good and Mr. Binns said "Yes, it is good". He was willing to stand on it. He thought he was right and he went up on that one.

Now, the Circuit Court said "No, you are wrong. Your return is no good. This is what you have got to do. Take the allegations of the petition and if you want to deny them you deny them, otherwise you don't."

Now, he didn't do that. This is nothing new that we are filing. The original was there. The mandate was spread on the record 10 days ago and Mr Binns is complaining that we just served him today. He has had 10 days.

The Court: Counsel, just a moment. I have never tried a case yet where I haven't allowed counsel an opportunity to file either an amendment or additional affidavits. There is nothing new in this procedure so far as this court is [fol. 35] concerned. I don't know that you have ever tried a case before me but if you have and ever asked me for additional time I have never denied you that privilege. That has been my universal practice and I want to get the facts here. If they can't comply with the mandate then you have nothing to worry about.

Mr. Fleishman: The only point in connection —— I appreciate your Honor's position. I think it is eminently fair, but in this case Mr. Carlisle has been in jail now for two and a half months now while we have been litigating this thing. If we don't end it up sometime Mr. Binns can come in next week and the week after that with other reasons for continuances. The general rule is fair but this is not fair that Mr. Binns should be given further opportunity ——

The Court: Counsel, let me ask this question. Suppose I grant the writ and the Government appeals cannot they get an order that these people be held pending that appeal or can they not. I don't know whether they can hold these men or not.

Mr. Fleishman: I would say, your Honor, there would at least be a substantial question that we were right and on that ground I say we are entitled to bail.

The Court: This isn't a criminal case. This is a civil case. I don't know. You people who handle habeas corpus proceedings make a specialty of it. Mr. Del Guercio, while I was United States Attorney, knew something about depor-

tation proceedings. He might answer that question. Sup-
[fol. 36] pose I grant a writ in this case and you file a notice of appeal can you retain the alien in custody?

Mr. Del Guercio: I think it would be a matter in the discretion of the court.

Mr. Porter: My recollection of the rule is, if I may interject, in the event of an appeal by the Government then the matter could be presented either to the trial court or in the event of denial there to the court of appeals.

Where the appeal is by the petitioner that is not the case; but there is a separate paragraph of the rules, as I remember, to that effect with reference to an appeal by the Government.

The Court: I think it is to your advantage, gentlemen, to bring out the facts here. Unless the Government is in position to show some activities that would be detrimental to the security of the country, I am going to discharge or release these petitioners. That will put the burden on them. If they can't do that I will be satisfied that they have had their full day in court and I will grant bail pending appeal. But if you leave the thing up in the air I probably will not because there is a doubt in my mind right now. At most I shall not continue the case beyond Tuesday afternoon.

Mr. Porter: I would just like to add this one point. I think this is what Mr. Fleishman had in mind too. If a showing on a reasonable basis for a continuance were made [fol. 37] of course there would be no question about it, but counsel hasn't made any showing here, your Honor. He has had since the original petitions were filed—specifically since December 16.

The Court: There is no use arguing that with me because it is within my discretion and I would like, when I decide this case the next time, to get it in such shape that the Circuit Court's opinion will be final, because one or the other is going to appeal and if it isn't in better shape than it is now the Government is going to have to appeal.

Mr. Porter: I don't know.

The Court: I don't know that the Government will appeal but if anybody appeals I want this record complete. Right now I don't think sufficient showing has been made but if they can make one I am going to give them that opportunity just the same as if you came in here and some

witnesses were absent this afternoon and you said that witness could prove certain things I would continue the matter until next week to hear that witness.

Mr. Porter: I appreciate that but in the ordinary case we don't have a continuance at the price of people spending four additional days behind bars.

The Court: Inasmuch as they spent Christmas in jail this is going to be a small matter.

Mr. Porter: That is a high price to pay. Now I submit, [fol. 38] your Honor, without prejudice to your ultimate ruling here, and recognizing the equities which we have already mentioned, your Honor can and should as a matter of judicial discretion of the continuance upon the temporary release of these petitioners with an order that they return on Tuesday or whenever your Honor directs, for ultimate disposition of the matter.

The Court: Counsel, I take this position. I am following the mandate of the Circuit Court because I have to. It is my obligation and my duty, but I am not going to release men and women that the Attorney General's office says are security risks.

Mr. Porter: Even though they haven't a thing but a conclusion to support it?

The Court: The executive department of the Government claims they are security risks and that they threaten the security of the home front while we have boys over there dying on the battlefields.

Mr. Porter: But your Honor says the facts so far submitted do not convince you.

The Court: I don't say that. I say they don't comply with the Circuit Court's ruling. That is all I am saying.

Mr. Porter: The Circuit Court says they should submit facts that would convince reasonable men.

The Court: You may hire a hall if you want to argue [fol. 39] further. You are just wasting your time. You have known me long enough to know you are wasting time when you argue facts with me.

I am going to hear this case on its full merits and if there is a dispute as to the question of fact I expect the parties to have their witnesses here.

Mr. Porter: Would your Honor do this for me? Would your Honor ask counsel what allegations of the traverse in the Carlson or any other case he thinks require a rejoinder or an answer.

Mr. Binns: I had the Carlisle papers here a moment ago.

Mr. Porter: In the Carlson case, your Honor, you may recall the first paragraph of the traverse is a general demurrer and the second paragraph is in the nature of a special demurrer addressed to paragraph 13 of the return.

Paragraph 3 incorporates by reference the allegations of the petition and the fourth paragraph re-alleges facts set forth in the return and in the petition with reference to the prior administrative proceedings.

The other paragraph is kind of a motion to dismiss or to strike the return.

Now I submit that there is nothing for the Government to meet factually with reference to this traverse.

The Court: I am not so concerned with the traverse. I simply want to know I am right if I discharge any of these [fol. 40] petitioners. I want to be certain that the Government has no evidence as to their being a present danger. That is the only thing I am concerned with.

Mrs. Rosenberg: May I be heard, your Honor?

The Court: I will listen to you if you don't talk too long, but I am going to grant counsel time to file amended affidavits or additional affidavits and any additional other papers they want to.

I am going to continue this case until 2:00 o'clock Tuesday afternoon and I will have all week to hear it.

Mrs. Rosenberg: I just wanted to say —— I would like to call to your Honor's attention the point you just made that you are so much interested in the request of the Government for an opportunity to examine the traverse and answer but that you are more interested in evidence.

Now as to that point I don't know that any additional time would serve any purpose which could not have been done in the intervening period. They had time, adequate time to raise all the evidence that would be required—that is as to the facts.

Now you, yourself, pointed out, your Honor, that at least in three of the cases there were no facts upon which there could be a decision keeping these people in custody, but as to the question of membership it was past membership and that there was no present activity of any kind at all.

[fol. 41] The Court: There is one point of law I am interested in and that is whether or not the denial of membership

in the Communist Party creates any inference in a case of this kind.

I have only had one case submitted to me by Government counsel and I am now asking both sides to submit additional authorities by Monday noon.

Mrs. Rosenberg: But as to that point, your Honor ——

The Court: If there is an inference to be drawn I am going to call all these parties to the witness stand. I shall call them as my witnesses to determine if they are presently members of the Communist Party.

Mrs. Rosenberg: Assuming, your Honor, that there were a statement that or, facts to show that they were present members of the Communist Party?

The Court: If there is an inference to be drawn ——

Mrs. Rosenberg: And suppose the inference were drawn as you indicate in favor of the fact that they are, that in itself is not the kind of act to which the Circuit Court referred. It must be a fact relating to present activities which makes the individual petitioner a threat to the security of the country and not mere membership. Membership per se does not constitute that threat.

The Court: You want to remember we have two decisions which we are trying to follow.

Mrs. Rosenberg: Well, read together, your Honor, it is [fol. 42] clear, as your Honor indicated, that it must be that kind of fact—not the fact of membership.

The Court: I am asking for that and I am going to give the Government an opportunity to introduce an answer.

Mrs. Rosenberg: May I urge, if the court please, just this one point that was recited in the Circuit Court's opinion, that whether there is a factual reason back of the action must be shown. This is the crucial sentence it seems to me, be shown in the proceeding or evidence produced here.

The Government has had ample time so to do but still keeps locked within its chest the knowledge of what that information is or what the facts are and the court characterizes that action in this way:

> "The imagination can hardly create a situation more incompatible with the spirit of our institutions than that one civil official's completely secret viewpoint could be the basis of sustained imprisonment."

And the Government has done nothing more in the recent return than it did before. It has kept locked within its chest whatever facts it has. It is our contention they do not open that chest because there is nothing there.

The Court: Just a moment. If you want to keep on arguing I will deny the petition and let you take it up on appeal. I am simply trying to find out whether they can comply with the mandate. As I told you, I have no intention [fol. 43] of deciding this case from the bench. I shall not make a decision today. I advised you this morning I was going to take the matter under submission. You are not accomplishing anything now. I simply hope that when we resume next Tuesday afternoon we can complete this matter. I have the balance of the week to give to it if necessary and if they file the papers with me by Monday noon I will be familiar with those papers and will be able to decide it then.

The only point of law that I am interested in is this question of inference—what effect in a case of this type does a refusal to answer a question have. You probably made a note of the one case that counsel referred to this morning.

The matter will be continued until Tuesday afternoon at 2:00 o'clock and at that time if there are any additional affidavits or papers to be filed they must be filed by Monday noon and served on counsel.

Mr. Binns: Your Honor, can you give us to the end of the day on Monday because I have an appearance before Judge Westover Monday morning?

Mr. Porter: That doesn't give us very much time, your Honor.

Mr. Binns: Your Honor, they have no further pleadings but if they want time I have never denied it to them to date. This is the first time I have asked for a continuance.

The Court: Are you the only one upstairs who can work [fol. 44] on this case?

Mr. Binns: I am not the only one upstairs, your Honor, but I am the only one working on this case.

The Court: It looks to me like you need some help.

Mr. Binns: There is a stenographic problem, your Honor. We have four separate cases here and it takes just so much time.

The Court: When I was up there we had only 16 or 18 people and now have 30 or 40.

Mr. Binns: Yes, and we have a lot more work up there, your Honor. The courts keep us busy now.

The Court: The other side got out a lot of work this noon from about 11:00 o'clock to 2:00 o'clock.

Mr. Porter: Yes, and we had to hustle.

The Court: I will give you each until 5:00 o'clock Monday afternoon and expect you to serve counsel by that time.

Mr. Porter: That is the additional affidavits as well as the points and authorities?

The Court: Yes.

Mr. Binns: Yes.

(Whereupon at 3:00 o'clock p.m. the above entitled matter was concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE BEN HARRISON, Judge Presiding

No. 12491-BH Civil

In Re: FRANK CARLSON, also known as SOLOMON SKOLNICK

No. 12492-BH Civil

In Re: MIRIAM CHRISTINE STEVENSON, etc.

No. 12503-BH Civil

In Re: HARRY CARLISLE, also known as HARRY CARLYLE

No. 12505-BH Civil

In Re: DAVID HYUN

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

January 9, 1951

[fol. 1] APPEARANCES:

For the Government: Ernest A. Tolin, United States Attorney, Los Angeles 12, California; by Walter S. Binns, Assistant United States Attorney.

For Carlson: Margolis & McTernan, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California; by John W. Porter, Esq.

For Stevenson: Rose S. Rosenberg, 709 Rives-Strong Building, 112 West Ninth Street, Los Angeles, California.

For Carlisle: Stanley Fleischman, Esq., 1614 North Argyle, Los Angeles, California.

For Hyun: Milton S. Tyre, Esq., 902 Quinby Building, 650 South Grand Avenue, Los Angeles, California.

[fol. 2] Los Angeles, California, January 9, 1951, 10:00 A. M.

The Court: You may proceed.

The Clerk: 12,491 In Re Frank Carlson.
12,492 In Re Miriam Christine Stevenson.
12,503 In Re Harry Carlisle.
12,505 In Re David Hyun.

The Court: Are counsel ready in these four cases?

Mr. Porter: Petitioners are ready, your Honor.

Mrs. Rosenberg: Yes, your Honor.

Mr. Binns: The Government is ready.

The Court: Counsel, I think the court should correct an impression it conveyed at our last session. I have studied the Landon Petition over the week-end. At a prior session I agreed in part with counsel's position on the meaning of the opinion in that case, but since studying it further I have come to a contrary conclusion.

The other day I felt that the Circuit Court was directing the Government to establish its case by probable cause, but since re-reading and studying this opinion I have concluded that is not what the court meant.

What the court really intended and meant was that it was incumbent upon the Attorney General to show that there was a basis for the exercise of discretion and that then the burden shifted to the petitioners to establish that there [fol. 3] had been an abuse of that discretion.

You will notice on page 3 of the decision it says:

> "And we add, the very fact that the Attorney General (or his assistants) has the power to grant bail before a deportation hearing or refuse it, carries with it the necessity of exercising discretion and certainly discretion must be based upon some phase of fact."

Then turning to page 8 it says:

> "Habeas corpus, as we know, is civil in nature and the petitioner bears the burden of proving that his retention is illegal upon regular process being shown for the detention."

And then turning the next page it says:

"It would seem, therefore, that the return is insufficient when laid beside petitioner's undenied allegations for the reason that petitioner has gone about as far as he could go to prove his claim that his release will not prejudice the United States. If there is good reason for the action of the Director in denying bail it is locked in the Director's own chest of knowledge and is unrevealed for proof against it. Surely, in this circumstance, petitioner is not burdened by the impossible task of imagining and refuting causes which may have had a bearing upon the Director's discretion. Unless it is true that he is a bad risk, and the trial [fol. 4] court could not judicially conclude that he was merely upon the Director's say-so."

Then it states further on the same page:

"But the Director is wrong in assuming that a petitioner is arguing to a point inconsistent with the principle that a petitioner in habeas corpus has the burden of showing that his detention is legally wrongful. In this phase of the case petitioner is not here questioning the sufficiency of the warrant or the return thereon as to its authenticity. He is not questioning the due process leading to the issuance of a warrant to a prison warden upon conviction and sentence after a court trial of facts, as is the case in a habeas corpus proceeding related to a criminal case. He is contesting the legality of his detention upon the ex parte finding of the Director and of the Director's order thereon which is a part of the Director's return."

And reading on:

"If the Director is given the power to use his discretion but that such discretion must not be abused, and the trial court so held and we agree, then the Director's return, to be good, must state some fact upon which a reasonable person could logically con- [fol. 5] clude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing. Without this much, the

return is insufficient unless it is supplemented by affidavits or with evidence at the habeas corpus hearing, and this has not been done. In this situation the burden of the petitioner is not shifted to the Director and the Director is not required to 'show his hand'. All he must do is to assert fact, not conclusion, as to the basis for his action. The truth of the Director's reasons for denying bail if at all reasonable is not triable by the district court in habeas corpus any more than the truth of allegations in a criminal charge is decided by a magistrate in a preliminary hearing. But whether there is factual reason back of the action must be shown in either proceeding."

Then the court's directions to me:

"The judgment is reversed and the cause is remanded with direction to the district court to take the undenied material allegations of petitioner's answer as true and to give the Director an opportunity to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail, and to take note [fol. 6] of facts relating to delays in the deportation hearings, and decide the issue upon such evidence and any other proper evidence which may be offered and received, all in conformity with this opinion."

As I view it there are two approaches to this question.

The first is that this is to be considered as comparable to a preliminary hearing. A preliminary hearing requires that two things be established: First, in a criminal case, that a crime has been committed and, secondly, that the defendant has probably committed that crime.

In this case there is no dispute but what the applicants are aliens.

Then the second question is are they the class of aliens who are referred to in the Internal Security Act of 1950.

That brings us down to the question that Mr. Porter raised the other day to the effect that that fact alone, the fact that they were communists, that the applicants were communists in and of itself is not sufficient and that the director would have to show some overt act on their part as communists to justify their retention.

I now take the view, in view of the findings of Congress in the Security Act, that if a person is an active member of the Communist Party, active in its program, that that shows sufficient ground upon which an alien may be retained in [fol. 7] custody.

The affidavits which have been filed in this case with the return in my opinion present facts upon which a reasonable person could logically conclude the denial of bail is required to protect the country.

Therefore I feel the affidavits are sufficient in that respect and that the burden of proof now shifts to the petitioners to establish that there has been an abuse of discretion on the part of the Director.

Mr. Porter: May I address myself to that matter, your Honor?

The Court: Certainly.

Mr. Porter: Our position is ——

The Court: When you say "our position" are you talking for all of counsel or just for your client? We have treated these cases as a unit in a sense, however the return on each one of them is somewhat different. Now, I want to know whether you are talking for your client or for all of the petitioners? In other words, I want to know if I am going to have to listen to all attorneys cover the same subject matter.

Mr. Porter: I think in any case that will not be necessary, your Honor. I think for simplicity it is preferable that I speak as counsel for petitioner in the Carlson case only and that to the extent that my comments adequately express [fol. 8] the position of the other petitioners and if I do not they can so indicate and so when I, in order to avoid the personal pronoun say "our position" I mean to be understood as speaking for the petitioner in the Carlson case and as counsel for him in that case.

Our position on this question has already been stated to the court as a conclusion and the court has adverted to it in the remarks which your Honor just made, namely, that assuming a showing of present membership in the Communist Party, such a showing as a matter of law falls short of establishing a reasonable basis for confining the petitioner without bail pending determination of his deportability.

I would like to develop briefly and succinctly our reasons and the authorities upon which we rely for that position.

Before I do so I should like to comment also, briefly, on the position taken by the Government here, particularly as illustrated by the supplemental return and amended affidavit filed in the Carlson case yesterday.

I would like to call to the court's attention first of all, the fact that in the supplemental return of the respondent Landon in this case, pleading to the petition which was incorporated by reference in the traverse, the respondent states that he has no information and belief as to paragraphs 8, 9 and 10 of the petition.

[fol. 9] Reference to those paragraphs reveal that they are the principal paragraphs which allege what we have called the personal circumstances of the petition. Specifically in this case, paragraph 8 alleges his date and place of birth and date of entry into the United States, his residence in the United States continuously since his entry in 1913.

The fact that he filed a petition for naturalization, the processing of which was interrupted only by the deportation proceedings against him; the length of his residence in California and in Los Angeles; the fact of his marriage to a citizen and his parentage of two children, both born in the State of California.

I mention this only because it seems to me, if your Honor please, that this is somehow symptomatic or symbolic, if you will, of the Government's position and attitude throughout in this case.

Here we are told on one hand that the Government has reasonable ground to believe that this petitioner, if enlarged would engage in activities inimical to the public safety and on the other hand we are told by the same official, the District Director that he has no information and belief sufficient to enable him to plead with respect to the facts of the petitioner's birthplace, date of birth, entry into the United States and the other facts which I just listed, all of which, obviously, would be and I think the court can [fol. 10] take judicial notice of this, would be contained in his naturalization file as well as in the departmental records in connection with its deportation proceedings against him.

Then having denied that it has any information sufficient to form a belief as to the petitioner's personal circum-

stances, the supplemental return goes on to allege that petitioner has not been a law abiding resident of the State of California and City of Los Angeles, and to allege that he has been a member of the Communist Party during his residence in the State of California and the City of Los Angeles.

What this all boils down to, I submit, your Honor, is that the Government here right from the very start has taken the —— has acted upon the view that the mere fact of present membership in the Communist Party is ground for denial of bail in these cases but it has been unwilling to come right out and say so, and so we have been involved in this litigation going on now for some three months, and only now, with the aid of the court, is this underlying issue finally brought out in anything like a clear and unambiguous form.

This is, if your Honor please, both the supplemental return and the affidavits of the respondent are full of conclusions, of ambiguities, of phrases such as "has been" with respect to membership, from which it is impossible for the reader to tell whether they mean to state that they are present active members or something else. But I am not [fol. 11] interested in those quibbles at this point, your Honor.

I say to your Honor that the respondent here, from the very start, has done his utmost to place in the mind of this court the impression that the petitioner Carlson is a man who has somehow been guilty of unlawful conduct or of acts which are inimical to the safety and order of the United States; that the language—the calculatedly loose and conclusionary language which we have faced since the original return here has had the effect, if not the purpose, only of concealing the real position here and that the Government is guilty of bad faith in attempting to impose upon this court.

The Court: Now, counsel, just a moment. There is no use talking about "bad faith" one way or the other. I think you will have to admit that the Government cooperated with you in order to get an early decision from the circuit court in this matter, to get a ruling. That ruling has helped to clarify the atmosphere but still there is something that is undecided.

The court only decided the one point and I have assumed in this case that these people would appear at any future hearing if they were admitted to bail.

Mr. Porter: The Government hasn't denied that, your Honor. Mr. Binns for some reason isn't willing to stipulate but an analysis of the pleadings show that that is one of the undenied allegations of the petition which must be taken [fol. 12] as true.

The Court: But the court must bear in mind and I am frank to say that I have been receiving an education in these matters as we go along. I have learned something. Maybe I haven't yet learned what it is all about, but the Internal Security Act of 1950 in its findings stating the necessity for legislation specifically designates those who are members of the Communist Party as agents of a foreign government that has as its objective the overthrow of this government by force and violence and I must accept those findings.

Mr. Porter: Passing the effect of the findings upon this court, let me address myself then if I may, to an analysis of the findings to determine whether your Honor's characterization of them is actually borne out by the language that Congress has used, because I think if we look at Section 2 of the Internal Security Act closely, your Honor, we will see that the Congress has not made any findings whatever with respect to the responsibility of an individual member of the Communist Party of the United States for any kind of activity or for any of the horrendous things and purposes which the findings attribute to what they variously call the communist movement, world movement and so on.

The Court: What do you say about Section 9 which reads as follows:

> "In the United States those individuals who know-
> [fol. 13] ingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement."

Mr. Porter: I say two things, your Honor, to that, at least. First, that that paragraph talks about individuals who "knowingly and willfully participate in the world

Communist movement" whatever that means. That paragraph is not talking in so many words about individuals who are members of the Communist Party of the United States. And as a matter of fact the Communist Party or movement in the United States isn't even mentioned until we get over to the final paragraph, subsection 15, which is a very interesting and very significant paragraph if your Honor will look at it with me for a moment.

What does that say? Paragraph 15 of Section 2 says:

> "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined."

Then the next sentence:

> "Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the government of the United States by force and violence [fol. 14] may seem possible of achievement",

and these are the operative words of the paragraph:

> "It seeks converts far and wide by an extensive system of schooling and indoctrination".

And what is that talking about? About nothing, nothing, I submit to your Honor, but activities protected and secured by the First Amendment. It is talking about speech. It is talking about education. It is talking about publications.

The Court: But read on further:

> "Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as

an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

[fol. 15] Mr. Porter: Yes, and what is that if your Honor please? Only the broadest kind of conclusions as to the necessity for general legislation and it doesn't come close, I submit, your Honor, to any kind of a finding as to the obligations, the activities, the commitments or responsibilities or whatever you choose to call it, who is an individual in fact or who is alleged to be a member, an active member of the Communist Party of the United States.

Now, I want to make something completely clear here, your Honor, before I go any further. I want to say that I think these findings are nothing but conclusions; that they have no support in anything which the courts regard as credible evidence and that if we were to look behind them we would recognize and recall that these are compounded upon hearsay and gossip submitted to the House Committee on Un-American Activities for a period of years and swallowed whole by the Congress during a period of unfortunate hysteria.

But what we are concerned with at this juncture is what can we logically and reasonably conclude with respect that Frank Carlson, who is sitting in a grey suit on the front bench of this courtroom if he were at large on bail tomorrow would do something which could ——

The Court: Counsel, you want to remember that one drop of water may not cause a flood but enough drops of water may cause a flood.

[fol. 16] Mr. Porter: That is the point I want to come to in just a minute, if your Honor please.

Now I say if your Honor please, and I submit that our authorities and our American traditions bear me out to the hilt that responsibility for one's acts or even if we reach that stage, for one's beliefs under our Constitution is an individual matter and that the most conclusive proof of an association is not a substitute and is not sufficient to establish individual responsibility as our law requires.

I want to recall in this connection just a couple of cases

which I know your Honor is familiar with, but which I think ——

The Court: Assume that I am anyhow.

Mr. Porter: Which I think it is good to recall in this case. One of them is ——

The Court: Just a moment, Mr. Porter. We will take a short recess.

(Short recess)

The Court: You may proceed.

Mr. Porter: I was about to comment briefly on the application here of the Sneiderman (phonetic) case, your Honor. In that case the court will recall there was involved both the question as to the character or program of the Communist Party in the United States at the time involved there, and also the relationship between the individual [fol. 17] appellant, Sneiderman, and the Communist Party.

The court made this comment which is, I think, so apt for the case at bar, the Carlson case. The court said:

> "Appellant's conduct",

and this is a quotation.

> "has been law-abiding in all respects. According to the record he has never been arrested or connected with any disorder and not a single written or spoken statement of his advocating violent overthrow of the government or indeed even a statement that he desired any change in the Constitution has been produced."

And that failure of proof with respect to individual belief, if you will in that case, let alone activity which is the test before us here, was one of the bases of the court's conclusion in the Sneiderman case.

I wanted also to refer to the DeJonge versus Oregon case in which as you will recall, the appellant was convicted for the crime of conducting a public assemblage in violation of an Oregon criminal syndicalism statute, and here too a couple of brief quotations from the court's opinion I think are illuminating.

First the court said:

> "If the persons assembling"

at the meetings such as the state complained of in that case,

[fol. 18] "If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."

And here we could paraphrase that statement with equal authority in law, I submit, to read that it is a different matter when the government instead of prosecuting Mr. Carlson for the activities which it claims against him or predicts from him, seizes upon mere participation in a peaceful organization and a lawful organization as the basis for his detention indefinitely without bail.

Subsequently in the opinion the court made another comment which I think is apt. The evidence there, as the court remarked, failed to show this: The appellant DeJonge had engaged in any activities other than participation in the meeting in question.

Just as here the evidence, if we can call it that, fails to show anything except the conclusion that Mr. Carlson was or is a member of the Communist Party. Then the court says:

"Notwithstanding those objectives",

[fol. 19] that is of the Communist Party,

"the defendant still enjoys his personal right of free speech and to take part in a peaceable assembly having a lawful purpose although called by that party. That was of the essence of his guaranteed personal liberty."

In other words, if Your Honor please, the mere membership of Mr. Carlson or of anybody else in the Communist Party under the laws and Constitution of the United States as we find them today, is not by any stretch a sufficient basis for depriving him of his liberty and thereby taking from him the other rights to which all persons, native or foreign born, under our Constitution are entitled by virtue of the First Amendment.

Now, I want to refer your Honor to another provision of the McCaran law and which I think is particularly significant in this case and that is Section 4, and particularly to Sections 4(a) and 4(f).

As your Honor will see in Section 4(a) it makes it a crime for any person knowingly to "combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship * * * the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual."
[fol. 20] And the language there clearly harks back to many of the findings of Section 2 so that one might conclude readily that under the findings any member of the Communist Party of the United States would be contended by the Government to be a party to such a conspiracy as is outlined in Section 4(a).

But now look if you please, at Section 4(f). There it is stated by Congress:

> "Neither the holding of office nor membership in any communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

In other words the Congress itself refused to make the finding or to draw the conclusion or the presumption that your Honor does with respect to membership in the Communist Party in and of itself. And this is interesting I think, in connection with a remark by Mr. Justice Jackson in his concurring opinion in the Douds case.

Without reviewing that case at any length I merely want to recall this quotation from that concurring opinion.

The Court: I remember the case. I read it today.

Mr. Porter: And as you will recall then Mr. Justice Jackson lists a number of points which he says Congress might have found and among them he says:

> [fol. 21] "Congress could, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the party."

That is page 626 of 94 Lawyers Edition.

The Court: I have it.

Mr. Porter: But that precisely is what the Congress refused to do in Section 4(f) which I just read to your Honor.

The Court: And Mr. Justice Jackson said further:

> "Every member of the Communist Party is an agent to execute the Communist program".

Mr. Porter: He says Congress could have found that as I recall.

The Court: That isn't the way I read it. It may be.

Mr. Porter: I think all of those statements are appended from the initial premise that Congress could have made such findings but what we have to consider is what Congress did find and what the legislation does provide and so we know from a reading of Section 4(f) that Congress expressly refused to make that finding.

Now, the logic of the Government's position and of the position which your Honor has enunciated here, obviously indicates that every alien member of the Communist Party is per se a threat to the security of the United States and therefore under such logic belongs only behind bars.

The Court: That is not a correct statement, counsel.

[fol. 22] Mr. Porter: Well, that is the way my mind runs from the premise which you have indicated.

The Court: All I am saying is that when there is affirmative evidence that they are members of the Communist Party and they are aliens and active in that organization, the burden then shifts to them to show they are not a threat to national security.

Mr. Porter: That recalls to my mind, your Honor, one of the undenied allegations of our petition which I think I can find readily. I don't want to take more than my share of the time here, but I recall in our petition there is an allegation not contradicted by either of the returns or the affidavits except by the conclusion drawn by Mr. Landon from the alleged fact of membership in the Commuist Party, an allegation that the petitioner has not —— has no intention in the future of engaging and will not engage in any activities of the sort attributed to him by the District Director. That allegation appears in paragraph 18 and 18(a) of

our petition, which is re-alleged in our traverse, I think it is correct in logic to say that if, in the absence of countervailing evidence then as to present membership, the court were to hold that a sufficient showing has been made ——

Mr. Binns: Your Honor, may I interrupt counsel for a moment? I have 18(a) and it says:

> "That said petitioner was arrested as aforesaid on [fol. 23] October 21, 1950, without warrant and without authority in law."

I wonder if you have misstated it.

Mr. Porter: There are a number of subparagraphs in that section. It is 18(a), the amendment to the petition.

We have authority with respect to this proposition that evidence of present membership in the Communist Party, not rebutted, does not support detention without bail.

It is true the authority antedates the McCaran law but we have shown, I submit, that the McCaran law requires no different finding, makes no different finding and requires no different conclusion.

The case I speak of, as your Honor may recall, is the Perenski (phonetic) case in the Second Circuit, where the Government attempted to justify at that stage, an increase in the petitioner's bond from $5,000 to $25,000 pending the determination of deportability. There they attempted to justify that increase in bail, as the court said, on the ground of the danger to the public safety from his enlargement on bail:

> "But the long administrative record in evidence below,"

the court said,

> "fails to show any immediate or particular danger to be expected from this individual beyond other members of the Communist Party",

[fol. 24] pointing out that no other ground of deportation—no membership in the Communist Party has been shown by the Government.

The Second Circuit concluded:

> "Unless therefore the Immigration Service intends to confine all alien communists indefinitely during

lengthy deportation proceedings, there is nothing in the record to justify the singling out of this individual for unusual treatment."

Now, that is precisely, if your Honor please, the situation which we confront us. And we say, of course, not only that we do not advocate that all persons whom the Government claims to be aliens and members of the Communist Party should be detained in order to justify the petitioner's detention, but we say, on the contrary, that as the Perenski case points out, detention of any such person on that ground alone, in the absence of a showing of activity reasonably supporting a conclusion as to future conduct inimical to public safety is an abuse of discretion and a deprivation of the petitioner's Constitutional liberties.

Just a couple of words more and I am through.

The Court: Two?

Mr. Porter: Your Honor will permit me a literary allusion I trust.

In this posture of the case we are squarely, I submit your Honor, within the rule of the bail decisions which have [fol. 25] been referred to before in this court—Williamson versus the United States, the decision by Mr. Justice Jackson with respect to bail pending appeal on the part of the 11 leaders of the Communist Party. Parenthetically I might state to your Honor a fact which I am sure was a matter of public record, that among those 11 are a number who were foreign born. Nonetheless ——

The Court: Are they all citizens of the United States?

Mr. Porter: No, your Honor.

The Court: That wasn't a deportation proceeding; that was a criminal proceeding.

Mr. Porter: But included among the 11 defendants ——

The Court: It wouldn't make any difference whether they were aliens or citizens.

Mr. Porter: That was not Mr. Landon's position. As I understand it Mr. Landon's position is an alien communist per se belongs behind bars period. And it is the anomalous position of Mr. Landon that alien communists convicted in a criminal procedure are entitled to greater leniency than an alien communist who was not a defendant in a criminal proceeding.

It seems to me that we are now squarely under the Ninth Circuit decision on the Government's attempt to cancel the bail of Harry Bridges following his conviction. And this becomes the more-so in the light of the fact that the Gov-
[fol. 26] ernment's affidavits in the Carlson case on their face show and allege nothing, literally nothing.

They simply allege that he wrote an article for the Daily People's World, a newspaper; that he attended meetings or one meeting I think is mentioned, of the Civil Rights Congress and membership in an organization which is a lawful organization under the present laws of the United States.

Now, to sum up, if your Honor please, here is a man as to whom there isn't a word or a whisper, if your Honor please, in this record of any activities, past, present or ancient history, subject even to criticism let alone prosecution so far as it affects public safety. There is not a syllable but the Government says here:

> "Because you have exercised your liberties under the First Amendment in a way of which the Congress and we disapprove, we assume to ourselves the right to put you in jail and hold you there as long as it may be necessary or convenient."

Now I say to your Honor that to do this to a man who has lived in the United States of America since he was 6 years old, who has made his livelihood here, who is married to an American citizen, who is the father of two young children, whose record is unblemished insofar as the ordinary tests of decent citizenhip are concerned, "citizenship" in the broad sense, I say that to do that with such a man
[fol. 27] smacks of a tyranny which this court should be the first to strike down and to strike down in the same kind of righteous anger which I feel and which I may be expressing now too vigorously.

I think this is a sad day in the United States, your Honor, when such a proposition can even be seriously entertained in our courts and I urge upon your Honor a recognition of the implications of this for the future of our democracy.

Mrs. Rosenberg: I should like to be heard. I should like to point out first, your Honor, that I concur with Mr. Porter

in his theory of the case that present membership in the Communist Party is not the basis for a denial of bail; that there must in fact be shown some present activity upon which to predicate such a denial.

But even assuming that the Government projects the theory which the court itself this afternoon suggested as the basis of the case—that is the court, as I understand it, takes the view that in view of the findings of the McCaran Act, that if one is an active member of the Communist Party such a fact shows sufficient grounds to retain him in custody.

The Court: I say it is sufficient ground upon which the Attorney General may exercise his discretion.

You must remember that you are here today without offering any evidence whatsoever. You are relying entirely on the weakness of the Government's showing.

Mrs. Rosenberg: I don't agree, your Honor, if I may, [fol. 28] that that is an accurate statement of our position.

In our petitions we affirmatively show ——

The Court: The court has said they are to be accepted as true, the undenied allegations, but at the same time —— I was at first inclined to agree with your interpretation and discussed it with you in court and also in chambers. We also discussed this decision but after going over it and finding that the court accepted the Potash decision where it said that in order to upset the discretion of the Attorney General it must be upset by clear and convincing evidence, and then at the same time say that there must be some evidence here, was hard for me to reconcile until I took the opinion home over the week-end and studied it and then came to the conclusion that what the court was actually promulgating was that Mr. Landon or some individual by a mere wave of the hand, by a mere saying "He is a security risk" without having any foundation for that statement was not sufficient.

Mrs. Rosenberg: And you are now saying, your Honor, the Government has laid the foundation by making statements of fact with regard to past membership.

The Court: I will make my findings when we get through.

Mrs. Rosenberg: My point, your Honor, is ——

The Court: The only reason I made the statement I did was because I felt the statement I made the other day might

have been misleading and in fairness to counsel I should [fol. 29] correct any impression that I gave you then.

Mrs. Rosenberg: My contention is, your Honor, that even the Government's theory of the case has not been established by the Government —— the theory that the Government has is that present membership, although I reject the theory, and even on its theory these people should be released —— present membership is the fact on which the detention is predicated. Now in the case of Mrs. Stevenson, your Honor, there is no allegation or statement of fact with regard to present membership at all. All the statements in the return of the Government allude to past membership. There is nothing more recent than 1938 and my contention, your Honor, is that even on the basis of your suggestion today as court opened, that if there is present membership, that this is enough of a fact, enough of a showing by the Government to shift the burden then to the petitioners the Government hasn't met its burden and therefore it cannot shift to the petitioner.

We have shown, your Honor, that in the case of Mrs. Stevenson there are undenied allegations of her living in this country over a long period of years, of having reared a child in this country and the only thing the Government answers to that is that "we have facts which led us to believe that she was in the past a member".

I feel, your Honor, that the Government has not met its initial burden.

[fol. 30] Now, your Honor has indicated also your change in position since we last met was based on a re-examination of the case and on an examination of the McCaran Act.

If the court please, I should like to point out that the McCaran Act does not anywhere characterize the Communist Party per se as subversive. As a matter of fact it is very careful to say that rights under the Constitution are not to be violated in any way. I refer for that point to Section 1(b):

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having this effect."

And that contrary to the view that the McCaran Act sets out the Communist Party as subversive, there are as a matter of fact rather elaborate means by which the Attorney General must prove that as a fact by petition to the subversive Activities Control Board under which there must be a hearing and that is only as to the Party itself; that thereafter the individual members may go in and deny or cancel on the basis which is indicated in the Act, which presumably is that there is not personal guilt; that the only places, as [fol. 31] a matter of fact, your Honor, in which the Communist Party is mentioned by name are in two sections—one in the deportation section which sets out membership in the Communist Party as a basis for deportation and in the second place in the detention section under Title 2 in which, under detention, one of a numerous list of factors which the board may —— the detention board may consider is membership in the Communist Party.

As to all the other findings in the McCaran Act the allusion and characterization, your Honor, are to the "World Communist Movement."

Now obviously if it intended to so characterize the Communist Party there would be no necessity for the control board being set up for opportunity to be heard —— for the opportunity of cross examination and appeal therefrom. So it seems to me, your Honor, it is going beyond the intent of the McCaran Act to find as a fact that the Communist Party as such is subversive. And in addition thereto, to find that any member thereof is automatically and per se subversive.

So on those two grounds, your Honor, on the fact that as to Mrs. Stevenson there has been no present membership and certainly no present activity which constitutes a threat to the country and on the basis of the McCaran findings, they are simply findings and not facts which are still to be questioned and which can still be attacked even under the provisions of the McCaran Act and further under [fol. 32] Section 4(a) read together with Section (f) it clearly indicates that membership or even leadership in the Communist Party as such, shall not be the basis of any prosecution under the prohibited acts.

So for these two reasons, your Honor, I feel that as to the petitioner Stevenson that there should be an immediate release on reasonable bail.

Mr. Fleishman: If your Honor please, I would like to advert again back to the Circuit Court's opinion for a moment and show that at least in this case, in the Carlisle case, as a matter of fact the showing by return and affidavit is precisely the same in both cases —— that is the return in the original case, which the Circuit Court said was insufficient, and the return in this case —— in the return in the first case you will recall that the Government incorporated by reference the warrant of arrest which said that after his entry into the United States he, Harry Carlisle, has been a member of the Communist Party.

Now if from this the inference can be drawn that that is enough to put the burden upon the petitioner then we didn't meet our burden and the Circuit Court should have affirmed in that case but it didn't. It didn't because the Circuit Court said something more was needed. They said on pages 9 and 10, the Circuit Court said that the affidavits to support a return must show facts and not conclusions —— facts not conclusions; that, 1, the denial of bail is required to protect [fol. 33] the country and, 2, that petitioner's relief will prejudice the United States.

There should be facts as to those things and not conclusions. If conclusions were sufficient then according to the Government's contention those conclusions could have been drawn from everything they had in that return and yet the Circuit Court said that that wasn't sufficient; that we have to have some facts to show these two things or perhaps one of these two things would be enough.

Now, as your Honor indicated at our last session, the affidavit in the case of Carlson doesn't by any stretch of the imagination reach that.

It is hard to characterize it in any way other than to say it was the Director's best effort to meet this test but it didn't meet the test because it said that he has been a member of the Communist Party, but they said that, in the original petition, and the Circuit Court said that was insufficient.

Other than that —— other than that the Director has said that, if I remember correctly, he was an active member of the American-Russian Institute and that he spoke before a Civil Rights Congress meeting, and that he was reported in the newspapers to have given a speech on the Communist policy.

Now, these things don't —— just don't meet the test set forth in the Circuit Court's opinion.

[fol. 34] One other thing, in the Boyd case, if your Honor recalls on page 8 there is set forth part of the telegram that the Government had and which was incorporated in the return. And then they refer to "alien Communists" —— presumably currently alien Communists and they set that forth in the return, in the Boyd case presumably —— I don't myself have the affidavits so I don't know all that was in there, but this part of it, which was set forth in the decision, shows that in the return there, the Boyd case ——

The Court: The Boyd case was the case where Boyd was the commissioner, was it not? The Seattle case?

Mr. Fleishman: Well, you were referring to the Landon case so I took Boyd as the counterpart to that.

But there was an allegation in the petition, at least inferentially, that the petitioner was an alien Communist and again the Circuit Court said that was not sufficient; that either by some evidence or by some affidavit of the Government's they would have to allege facts which would, as I say, show either of the two things that they set forth on pages 9 and 10 of the Carlson case —— that is the denial of bail is required to protect the country and certainly the fact of a mere allegation, perhaps, that Mr. Carlisle would prejudice the country by perhaps sabotaging a ship or something like that. If these are the things the Government is working on these are the things that have to be set forth.

[fol. 35] We went up last time, as your Honor well knows, on this basic assumption, and the Government set it forth in the warrant, that they had been Communists and since they had been Communists they were this danger and the Circuit Court said that was insufficient and certainly in this case, the Carlisle case, there is not one whit more than there was in that case.

For that reason we believe that regardless of whether your Honor is right generally in the proposition asserted at the beginning or whether the petitioner is right generally on the proposition, insofar as the Circuit Court is concerned there has to be more than an allegation —— general allegation. There must be facts which would lead to the inference —— from which a person could draw the inference that the person would be a danger to the United States if enlarged on bail.

The Court: I understand the Government's position to be, and I want to see if I am correct, the Government's position is that the affidavits here and the return is all the information that you are going to reveal to this court.

Mr. Binns: That is correct, your Honor.

The Court: That is all I want to know.

Mr. Fleishman: Now with regard to the last statement, there is an interesting addition —— I think this is almost the only addition ——

Mr. Binns: Your Honor, you requested us at one time to have the hearing officers present so you could go into the [fol. 36] question presented here, and why there had been continuances.

The Court: They haven't made any point in the argument so far about that.

Mr. Binns: We have set that forth in the affidavits but you did request the officers to be present and they are present.

The Court: Under this new warrant there hasn't been any serious question about that except as to one petitioner. I am speaking now about the hearings having been postponed from time to time at the request of the alien. In the other case there has been a partial hearing and they are taking additional hearings in the Hawaiian Islands. There is no dispute as to that, is there?

Mr. Fleishman: I don't think so.

Mr. Tyre: Not on that point.

The Court: So at this particular period, under this warrant, they can't claim there has been any undue delays.

The Circuit Court asked this court to take note of the delays. I don't know what they mean by that. But they asked me to take note of it.

However under this new warrant and proceedings there have been no delays as yet, has there?

Mr. Porter: None more than ordinarily. No more than would ordinarily be the case by virtue of the necessity of preparation and conflicting commitments of counsel.

[fol. 37] Of course the litigation in these very cases with which we are concerned today interrupted the deportation hearing to some extent so far as I was concerned.

Mr. Fleishman: With regard to the question just propounded by your Honor to the Government, there is this interesting addition of the Boyd case to the Carlson one it seems to me.

Here the Government is alleging in substance, that it has good reason —— that it has considered all of the relevant facts and has come to this conclusion that they ought to be denied bail.

Now in the Boyd case the court said on page 9, and I will paraphrase it, that mere proof of consideration of the relevant facts by the Director is insufficient. In other words merely stating, as the Government has here stated, that it has considered all the relevant facts and having considered these facts has come to this conclusion, the Circuit Court said that is not sufficient. You have to tell us what those facts are. Let the petitioners, if they will and can, deny them or explain them or if they prefer not to then let the court weigh them —— let us weigh them and see whether they have the weight that would call for detention without any final determination.

The Court: Yet on the other hand the court said that Mr. Landon doesn't have to reveal his hand.

Mr. Fleishman: It so states, your Honor, but I am quite [fol. 38] willing to agree that the opinion is far from a model of clarity, but we do have to work with it and there are certain things that are self-evident in it.

One of the things and the thing that I am trying to urge at this point is that the Circuit Court said that something more was needed than we had last time.

The Court: Yes.

Mr. Fleishman: Something more?

The Court: No dispute about that.

Mr. Fleishman: Now, I have looked and I can't see that anything has really been added at all because again when we realize that the former return, the return in the first case incorporated by reference the warrant which stated membership in an ambiguous way, from the warrant you cannot tell whether they were claiming present membership or merely past membership. They simply said "after entry has been a member of the Communist Party". It is precisely the same language as used in this return —— precisely the same language.

The difference is that instead of incorporating it by reference from the warrant the Government does now allege it in the return itself, but surely that is not of material difference.

The Court: How about the affidavit?

Mr. Fleishman: Let us look at the affidavit, if your Honor please. The affidavit says with regard to member-
[fol. 39] ship in the Communist Party—paragraph 2—it is a long one, the operative sections, but with respect to Harry Carlisle it says:

> "With respect to Harry Carlisle, the petitioner herein, the service is in possession of evidence showing that said petitioner has been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that in 1932"

something happened; that in 1933 something happened; in 1935 something happened; in 1937 something happened.

Then coming to more recent history;

> "That in 1949 said petitioner was reported in the press as a speaker on Communist Party topics and activities; in 1949 said petitioner was active in the affairs of the *the* American-Russian Institute and was on its list of approved speakers" (said organization has been designated by the Attorney General as Communist); "that in August, 1950, said petitioner was a speaker at a meeting of the Civil Rights Congress in Los Angeles (an organization designated by the Attorney General as Communist)."

These are the allegations, your Honor. If all of it is true it is no more than was set forth in the former return, namely, that the petitioner has been a member of the Communist Party.

Now if I am correct that something has to be added to
[fol. 40] the former return to make this return better then it is our contention and by "our" I refer to the Carlisle case because I am not sure what the other affidavits have in them, but in the Carlisle case there is nothing —— nothing at all has been added and since nothing has been added the return is obviously no good.

Now, I would like to at this point drop the merits of the case and just call to your Honor's attention something which has but, recently come to my attention and which I think, at least, ought t obe before your Honor briefly, and

that is that Harry Carlisle is a sick man, and that his present detention in custody constitutes a grave danger to his health.

This fact has been called to Mr. Landon's attention and he said that he would give it his consideration but that perhaps he would be released by your Honor at this hearing.

I spoke with Mr. Landon after the last hearing and he said he would postpone decision on that until after this hearing but I say this merely to your Honor upon, your Honor, the fact that this is an important matter and if it is a civil case or not the man is in custody and he is suffering..

The Court: I realize that anybody in custody is confronted, counsel, with a serious matter.

Mr. Fleishman: And he has been there now for some two and a half months, and certainly most of that time, as the Circuit Court itself has said, most of that time it has [fol. 41] been an illegal detention because there was never any sufficient return made.

The Court: They didn't say the detention was illegal. If they had said the detention was illegal that would have ended the proceedings and I wouldn't have had any more trouble.

Mr. Fleishman: Well, at least its legality wasn't sufficiently established —— at least I think we can draw that inference from the opinion.

The Court: It held in substance that the pleadings in the former proceding were insufficient.

Mr. Fleishman: The pleadings of the Government, your Honor.

The Court: Yes.

Mr. Tyre: If the court please, there hasn't been a return technically filed in the Hyun matter. However, I will waive that technicality. The number ascribed to the return was, I think, the one that was used in the first proceeding which was displaced.

I think that should be part of the record so there won't be any question about that.

I don't intend to repeat what Mr. Porter has said.

Mr. Binns: At this time may I move to amend the number on the return?

The Court: I thought the clerk had corrected that. They have all been corrected and put in the files. I think the

[fol. 42] clerk detected they were the wrong numbers and corrected them.

Mr. Tyre: I discovered that as the first error. There were a few others which I discovered and which I would like to call to the court's attention.

As I was saying I don't want to repeat what Mr. Porter has said but I do want to add one or two brief items and by "brief" I don't necessarily mean in my opinion they are unimportant.

Your Honor has called our attention to the lengthy findings made concerning the various activities of the organizations and particularly the Communist World Movement in Section 2 of the Internal Security Act of 1950.

Mr. Porter has stated and I am inclined to agree with him, that there is nothing expressly stated in those findings which applies to a particular individual of the Communist Party.

Now, he has given you several constructions of the Act and citations within the Act itself which he believes buttress that conclusion.

I would like to add one or two others.

First I would like to call to your Honor's attention Section 6(a), which involves the question of denial of passports to certain individuals.

Now there, unlike the section which we are involved with [fol. 43] here, where the aliens are being held without opportunity to bail, Section 6(a) specifically points out that membership itself in the Communist Party will be a basis for denying a person's application for a passport, rather than to say the Department of State or the Secretary of State shall in his discretion determine who shall and who shall not obtain a passport, and thereby use various factors to determine that.

In Section 6(a) Congress specifically stated that a member of the Communist organization, as it is defined in the Act, should not be entitled to a passport, and they say there is no specific reference of a basis upon which denial shall be made of the freedom of an individual under the section involved here.

Secondly, there may be a question raised in your Honor's mind, as in mine, by all these findings. What do they mean if it doesn't per se indict an individual member of the Communist Party.

Well, your Honor will recall that the principal purpose of this Act, at least as we gathered from the remarks made by the various members of Congress during the debate on the Act, and in fact in the various statements made before the committee, before the bill was introduced —— after the bill was introduced into Congress.

The principal purpose really was to cause registration of Communist Party organizations, Communist front organ- [fol. 44] izations together with the inferences that are drawn from that —— that is from the registration itself.

Now, in order to require that a Communist organization or any other organization be required to register, I think the Congress had a duty to make certain findings. I am not here to argue whether the findings were constitutionally made or correctly made, but merely to point out that those findings, in my opinion, are for the purpose of establishing the constitutionality of the Communist Party and Communist front organization registration section. That is the principal objective and purpose of this Act and, therefore, it purposely does not make reference to single individual members of the Communist organization or Communist front organizations as being in and of themselves such dangers or risks that certain penalties should be visited upon them.

Another important thing that I think we must remember is this, that the Bill of Rights, as I read a number of Supreme Court cases, applies to aliens equally as it does to citizens.

If a person is entitled to his liberty it is because of the Bill of Rights. He cannot be deprived of that liberty without proper due process of law.

Now if a member of a Communist Party organization is per se a risk whether or not he be an alien or whether or not he be a citizen, then a citizen as well as an alien, if he were simply found to be a member of the Communist Party organization or a Communist front organization, could be [fol. 45] imprisoned or could be in some other way deprived of his liberty or his property without due process of law, so to speak —— that is without more than a Congressional finding that membership in that organization was a basis for the denial of his liberty.

Now, that is the conclusion that must inevitably be drawn

if we conclude that Congress intended simply that a court find a person be a member of a Communist Party or Communist Party front organization and that there follows per se from that that he is a danger or a risk. In other words once a court should find that any person, whether he be an alien or a citizen, be a member of the Communist Party then that in itself establishes a basis for depriving him of certain liberties and properties.

Now, I don't think that was the intent of Congress. I think Congress intended to make certain findings with respect to the Communist Party organization —— a Communist front organization to visit upon it the requirement of registration, but I don't think that it was intended by Congress that a court find that an individual, simply because of his membership in and of itself alone was a basis for depriving him of any liberties or any of his properties without a finding by a court to that effect —— that is without a regular judicial trial which this, of course, does not purport to be.

We are involved here, of course, only in a summary pro-
[fol. 46] *pro*ceeding.

I move then to the question of —— a preliminary question on the question of delay.

The Circuit Court has suggested that is an important element to be considered and I think we should consider it.

It is true that the new warrant in this case was issued on October 31, 1950 and that relatively little time has passed since then.

The Supreme Court in the Mangrum (phonetic) case has held that this court has the power to, not just to look to the immediate proceedings before it but to look to the entire proceeding which preceded it and surrounded it —— the particular proceeding in which we are involved, to determine whether or not this detention is legal or illegal.

Now, we know that that warrant, issued on October 31, 1950, was done simply as a procedural matter. It was done solely because at the time this original writ of habeas corpus was being heard there was some question as to the legality of the arrest under all the circumstances, and therefore a second warrant was issued in order to provide for this particular proceeding.

The new warrant was not issued as a matter of —— in order to start all over again because they didn't feel that

the original warrant properly alleged sufficient facts to cause the deportability of the aliens. It was done only as a [fol. 47] procedural matter and therefore ought not be concerned when we consider delay, with the date of October 31st. We rather should be concerned in the case of David Hyun with the date of July 7, 1949 when the original warrant was served —— was issued and served on David Hyun.

Hearings were held —— some hearings were held after that date and the fact remains that hearings are still being held. They were started and they were stopped. They were started and they were stopped and now they have been started again. I speak of that literally, not by way of hyperbole. Actually this is the third proceeding, all based on the same general statement of fact and that is that David Hyun was a member of the Communist Party and therefore he is deportable under the laws of the United States.

This is the third proceeding and the fact remains that it has been since July 7, 1947 that these proceedings have been pending and yet there has been no order for deportation.

Now, in the David Hyun case it is, as the return indicates —— a hearing was held. There was no continuance granted. There was a statement that counsel requested a continuance. I don't deny that.

The return, I might say parenthetically, does not state how long a continuance was sought nor what the reasons were, but I don't think it is material because actually the hearing was held on that particular day.

[fol. 48] The return then goes on to say that, "The hearing has been continued —— not at the request of counsel or of the alien, but at the request of the Government for the purpose of taking depositions where? In the City of Honolulu and territory of Hawaii", more than 3,000 miles away.

Now, that was back in November or December when the hearings were held. I have forgotten offhand the exact date.

Today is now January 9 and as yet there are no allegations that the deposition have been taken nor that due process has been accorded to the alien to be present at the hearing or to cross examine such witnesses.

In brief, in matters of this sort, deportation matters, necessarily there has to be considerable delay in time in

order to obtain witnesses and bringing them here and cross examining them and allowing both parties considerable leeway to present their various sides. I don't say that by way of criticism, necessarily, of the deportation proceedings. Perhaps they could be more expeditiously carried on but in any event the Director of deportation proceedings, as they now exist, are such that quick, early and expeditious hearings are not being held. And I say again that does not necessarily indicate fault on either side.

The Court: Probably there is some fault on both sides.

Mr. Tyre: Well, in the Hyun case actually there has been no delay.

[fol. 49] The Court: As long as they are here there is no haste about having a hearing in the first place.

Mr. Tyre: That is correct.

The Court: Particularly if they are on bail.

Mr. Tyre: As long as there is no particular harm being visited there is no particular need to hurry except, obviously, to dispose of the proceedings so it isn't hanging over a person's head. But in any event it takes a long time for these procedings to be terminated. A very long time. In my own case they are taking depositions or will take them, I am not sure which, in Honolulu. I presume there will be an opportunity to cross examine those witnesses sooner or later or to file cross interrogatories or some procedure worked out and then the opportunity, perhaps, for other witnesses for the Government to be presented. I don't know. And then for the alien himself to put on a defense.

The Court: Just a moment, counsel. Let me ask this questions. If an alien is dangerous to the security of the nation is his personal convenience to be given consideration?

Mr. Tyre: No. I think what the court has in mind, once the court comes to the conclusion ——

The Court: I am not trying the merits of this case. It is being tried now on a procedural matter and it is being heard by me on a procedural basis. In other words the only question is whether or not the Government has made suffi-
[fol. 50] cient showing to now shift the burden, as provided in the Potash case, to the alien.

Mr. Tyre: I am only repeating, your Honor, what the Circuit Court has deemed to consider as an important element.

The Court: Then there should be a preliminary hearing. You have practiced law long enough to know that at preliminary hearings the defense always makes the other side show its hand.

Mr. Tyre: At least enough to establish probable cause.

The Court: And you have an opportunity to cross examine the witnesses. Yet on the other hand it says here that they shall not be compelled to show their hand. Now, there can't be a preliminary hearing without showing their hand. We also know that as far as the Federal Government is concerned it does not have to show its hand. If the district attorney were to walk in here today he could file an information against one of these aliens and the Government wouldn't have to show its hand until the time of trial.

The grand jury meets, I think, tomorrow, and will file numerous indictments against various individuals. You don't know what happened in the grand jury room and the Government doesn't have to reveal that even in a criminal proceeding, but this is a civil proceeding and it is controlled by the executive.

Mr. Tyre: There are two things. First of all I expect in grand jury cases if an indctment arises, and in all other [fol. 51] criminal cases where the United States Attorney comes into the clerk and slams down a complaint and demands an arrest the defendant will be entitled to bail.

The Court: Suppose there is a man arrested for treason. We have a man now who was arrested for treason who has been in jail for three years waiting for a ruling on his appeal following trial. That was about three years ago. I intended to try the case but I was taken sick and another judge tried it.

Mr. Tyre: I think we can say the general rule is when the United States Attorney asks for the arrest of a man that man generally, with few exceptions, has the right to bail.

In any event, the second point I want to make on what your Honor observed is, and it doesn't really have any direct relationship yet to the question of delay ——

The Court: I don't think delay is an issue in this case.

Mr. Tyre: The Circuit Court indicated ——

The Court: Asked me to take note of it and that is the reason I am doing it.

Mr. Tyre: I think the extent to which the court will recog-

nize that there is a current risk ought to be considered in the light of a lot of facts and one of those facts is the question of how long it is going to take —— in other words the court might say: "Well, I think perhaps there is a very slight risk in the individual involved. It isn't too great [fol. 52] and after all this man is going to be in jail, if we don't give him bail, for another month or two months or six months or a year or two or three years, which is literally very possible.

The Court: Counsel, that is where I think you do not fully appreciate the position of the court in this matter. We haven't the power to exercise the discretion and the only time we are allowed to interfere is when there has been an abuse of discretion. That is a discretion that is vested in the Attorney General.

Now, there isn't any question in my mind that if either one of these four people were charged with a public offense in this court, with their background, that the court would be willing to allow them very nominal bail. That is if they were charged with any public offense but here we have a different situation.

I make that statement in fairness to the parties involved. There is nothing here nor in their background, outside of their Communistic activities, as set forth in the return and affidavits, that would make them security risks. When they use the word "security risk" they mean a risk to our national security and that is the way I have approached this question.

It isn't a question of whether I have unbridled authority or discretion. It is rather a narrow field that I am dealing [fol. 53] in and that is the question of whether or not the Attorney General has placed sufficient facts before the court to indicate that there has been facts before the Attorney General upon which he could reasonably exercise a discretion.

Mr. Tyre: Now that discretion and the exercise thereof reasonably has to be exercised with relation to the facts.

The Court: But there are two factors in this case, first, as set forth, the personal history of the petitioners so far as their conduct is concerned and, secondly, whether or not their activities as alleged members of a Communist Party organization and that that organization is considered to be a world-wide conspiracy to overthrow this Government by

force and violence, whether or not on that theory alone the Attorney General would be justified in denying these people bail. You must remember that the Attorney General doesn't enjoy the expense involved in the commitment or confinement of these people. It costs money. I imagine that is why I probably fell into the error before, according to the Circuit Court. I assume when the Attorney General acted he exercised his discretion knowing that his budget is limited and the expense of maintaining these immigration places where these people are confined is expensive. That is where I fell into error before.

The question now is whether or not what has been added [fol. 54] here in the return indicates that the Attorney General has exercised discretion.

Mr. Tyre: And the court has to review that discretion.

The Court: Yes, I have to review it. There comes a point, however, if he has exercised his discretion, as I understand this opinion, then the burden does shift to the alien to show there is an abuse; but they first have to show that there has been an exercise of discretion and that burden is upon the Government as I interpret this opinion.

Mr. Tyre: And it is my position, your Honor, that as a matter of fact based upon the petition and the return and the affidavit attached to the return, there has been no sufficient showing that there has been a reasonable exercise of the discretion or if there has that as a matter of law on the face it shows that he has exercised his discretion in doing so he has abused that discretion and this is the reason for it.

I think your Honor indicated at the very outset that this was like a preliminary hearing.

The Court: I don't think it is like a preliminary hearing. In a preliminary hearing you have to show your hand. If you can't show your hand there isn't a preliminary hearing.

Mr. Tyre: You concluded there were two things for the Government to prove, one that these people are aliens and, secondly, that they were aliens of the type that were per- [fol. 55] mitted to be jailed without bail under the Act, and in determining that you said, if I got you correctly, "Are these aliens currently active in the Communist Party or Communist front organization?"

You said they had to establish those two facts existed, one that they were aliens and that they were active at this time with the Communist Party organization.

I think there is only one place we can look to see whether or not that burden, that preliminary burden has been maintained.

The Court: The only question here is whether there were sufficient facts, inasmuch as they are all admittedly aliens —there is only factor remaining and that is whether there were sufficient factual matters before the Attorney General or his authorized representative, upon which he could base and exercise his discretion. In other words, as far as the record shows here it might have been a mere whim without any substance upon which it was based

Mr. Tyre: We are going sort of around in a circle.

The Court: I know we are. We are going all around the circle and have been all afternoon.

Mr. Tyre: And this has been going on for some time, I am afraid.

The Court: It isn't going on very much longer. I am going to stop you pretty soon.

Mr. Tyre: I haven't had an opportunity to say very much [fol. 56] in this entire proceeding. I would like a few more minutes, if I may.

We are faced with the question as to whether or not past membership in the Communist Party lays a basis for the Attorney General exercising a reasonable discretion.

The Court: I think you should say this, counsel: Past membership plus present activities in connection with a Communistic or Communist front organization.

Mr. Tyre: Well, with respect to the addition that your Honor has made, that is present activities, that may be a question all right, that has to be faced, but I see nothing in the return or the affidavit to show any of that. I concede that the return and the affidavits in the Hyun case indicate that there has been no past membership on its face, but there is nothing in the Hyun return nor affidavit —— that is in the affidavit attached to the return, to show any current membership or activity in the Communist Party or Communist Party organization.

The Court: And as I understand the picture, as far as the immigration authorities are concerned, as far as depor-

tation is concerned, they don't have to show any more than the fact that at one time he was a member of the Communist Party.

Mr. Tyre: That is the position, as I understand it, of the Attorney General.

The Court: Yes. Isn't that the provision of the law as [fol. 57] it now stands? For instance a person who was a Communist, we will say, in 1940, a member of the Communist Party in 1940, so far as they are concerned in an order for deportation, that would be sufficient and for the purpose of deportation they do not necessarily have to show their present activities.

Mr. Tyre: That is correct, that is the way the law now reads and that is the way the law read before the McCaran Act and that was the way the law read for a considerable period before.

The only change as I understand it, is that the McCaran Act made, at least the Government has interpreted it, it is no longer requiring proof of the activities of the Communist Party but mere membership is a basis now for deportation.

But of course that is far from the question before us as to whether or not they are entitled to bail pending that. As your Honor has correctly and aptly pointed out several times, we are not here deciding the deportability of the alien.

The Court: Now, and I am not here to exercise a discretion, if the Attorney General has exercised discretion, until you by your own evidence or by evidence in this case show there has been an abuse of discretion.

Mr. Tyre: Well, now, the Attorney General ——

The Court: I am not going to argue it any more. Keep on talking until you run down and then I will rule.

Mr. Tyre: Well, I won't run down but I will stop after [fol. 58] a reasonable time, your Honor.

The Court: All right.

Mr. Tyre: I have considerable wind left. I don't intend to use it except to th extent I think it is necessary and that is to point out a few more points.

Past membership, as I undertand it, is the contention of the Government as being a sufficient basis for the deportation of these aliens, and in addition as I see it by the affidavit and the return is also a sufficient basis for the

imprisonment and detention of these aliens without bail while awaiting for the deportation proceedings to terminate. I say there is nothing in the affidavit or the return to show present activities.

Now, prior to the McCaran Act, according to the Potash decision, that was a basis for the Attorney General imprisoning these aliens and other aliens if they could show a reasonable risk was involved. However, prior to October 21 the Attorney General did not attempt to exercise such discretion. He apparently didn't feel, prior to October 21, that there was anything in the records of these individuals to warrant their being detained without bail.

Now, what has happened since October 21st is absolutely blank in the return.

The Court: If you were of military age you wouldn't think it has been static since then.

[fol. 59] Mr. Tyre: I am talking about in the return itself.

The Court: I think we have to take into consideration the world tension when considering these matters.

Mr. Tyre: I agree with your Honor. I think that is another circumstance but the court has said ——

The Court: Do you want me to advise them there is a war in Korea and an undeclared war in China?

Mr. Tyre: If your Honor please, it is not even stated that the Korean war or the war in China had anything to do with it. Of course the war in China could not have been involved because when these people were arrested it was not in existence.

The Court: Do they have to put in an affidavit that there is a conflict between the East and West and we are fighting it out on the battle fields of Korea? Can't the court take judicial notice of that fact?

Mr. Tyre: Of course it can take judicial notice of that fact and many other facts. But the defendants—aliens, rather, have no way of knowing which particular facts the Attorney General is going on which lay a foundation presently for these persons being—David Hyun in this case being a current risk to the community and welfare of the nation. He has no way of knowing and the Circuit Court says he has a right to know. All that we have seen here, all that has been told to us here is that there was past membership. There is nothing since 1947 except one statement [fol. 60] that David Hyun was a director of education in

1949, without indicating and incidentally, if the court please, the date in 1949 when that took place, and I think it is important for this reason—Mr. Binns' memorandum of points and authorities, which I saw about 20 minutes or half an hour ago, I note has several authorities on the point that once a person is established in a certain condition or a certain relationship and a few other presumptions—a presumption of certain other statuses, that thereafter they follow as a presumption that they continued in that status, but he has no case, assuming an establishment of one time Communist Party membership that that continued, nor of anything incidentally closely analogous.

Now, a number of things have occurred since the last allegations of fact in the return and the affidavit that David Hyun was a member of the Communist Party.

Now, the last allegation of fact, if your Honor will recall, was in the Hawaiian Islands and after he came over here in 1947, all in general terms without stating specifically what he did or where he went or anything about it. And also with the one statement that he was educational director in 1949.

Now, does that presumption continue up to October 21 and, to-wit actually February 10, 1950. I say it does not continue for this reason—the same reason your Honor has pointed out.

[fol. 61] Certain very, very important things have happened since July 7, 1949, which was the date, incidentally, when this first warrant was served upon David Hyun.

First of all they said "educational director in 1949". We don't know which date but at least in 1949 he was served for the first time with a warrant of arrest charging him with Communist Party membership and therefore deportable under the laws of the United States.

That in itself I think, alone, establishes enough to rebut as a matter of law a continuing presumption of Communist Party membership. Secondly there was the situation in June, June 25 of 1950, the Korean war itself which I think altered the world situation sufficiently to raise certain questions about the presumption continuing that existed back earlier in 1949. And finally the passage of the McCarran Act itself on October 21, 1950, or September 21, 1950, which again raises, it seems to me, considerable doubt as to the

continuing presumption of the membership, if such has been alleged or proved, of David Hyun back two years earlier.

Now in one case, *Williams versus Paine*, 169 U. S., page 55, that I have been able to find, at page 73, there was involved a question of a power of attorney that had been executed by a wife to her agent to transfer certain real property.

After that power of attorney had been executed the United States became involved in the Civil War and the [fol. 62] agent went down to the Confederacy. He was followed later by his own principal. He exercised his power of attorney by transferring the real property and the question arose as to whether or not the power of attorney of an agency which had been executed prior to the war, presumably continued after the war.

The court held under all the circumstances, because she followed him down into the Confederacy and they continued to live there and they had problems in common and so forth, that it did continue but the court said this:

> "Where it is obviously and plainly against the interest of the principals that the agency should continue or where its continuance would impose some new obligation or burdens, and certainly if would here, the assent of the principal to the continuation of the agency after the war broke out will not be presumed but must be proved either by his subsequent ratification or some other manner".

And that is dictum because in fact they found it had continued.

I think the dictum is important. In other words where the situation arises that it is obviously not to his interest to continue the presumption falls. And I think, your Honor, that all that has been established here, the most that has been established is that there was a past membership up until 1945 and then a general statement as to membership, [fol. 63] without specifically stating how or why, until 1949, and then on that date "educational director."

Since that time these various things have occurred which I say remove any presumption of continuing membership. There can be no evidence before this court, your Honor, of present membership or activity and obviously no allega-

tion or proof of any kind that he is currently a risk because of anything in particular which he has done or said.

Whether or not it be protected by the First Amendment David Hyun ought in all good conscience be relieved at this time from imprisonment, at least without the opportunity of posting bail.

Thank you, your Honor.

The Court: Counsel, how about this man Carlisle whom they say is in ill health?

Mr. Binns: Your Honor, Mr. Del Guercio says he was examined by the public health physician in San Pedro and they received a letter in which the physician said he found nothing wrong with him. Isn't that correct?

Mr. Del Guercio: That is correct.

Mr. Binns: And your Honor, in the Carlson case, through inadvertence it reads "Incorporation by reference of the traverse to include only the original petition and not the amendment which was subsequently filed and designated as paragraph 18". I would at this time move to amend [fol. 64] my supplemental return by interlineation to place the words in paragraph 3:

"deny the allegation contained in paragraph 18-A".

The Court: You had better file an additional affidavit. You can't amend Mr. Landon's affidavit very well, can you?

Mr. Binns: No, this is the return, your Honor.

The Court: He signed it, however. Didn't he verify it?

Mr. Binns: Didn't verify it, your Honor. He just signed it.

The Court: I don't think you can amend his verification.

Mr. Binns: That was an inadvertence on my part.

The Court: Have you anything further to offer?

Mr. Binns: No, your Honor. The court has expressed my version of the law and my version of the law is that what they have been endeavoring all afternoon to argue is that this court should usurp the function which the law has given the Attorney General, and that you should take on yourself the exercise of discretion in these cases when the Internal Security Act specifically, legally and constitutionally places that discretion in the Attorney General.

For instance an analogy that occurs to my mind is what they would like to do. Mr. Tyre desires to give you a set of facts indicating that because of the war in Korea or because of the Internal Security Act the man might have

changed his mind, but Mr. Tyre, your Honor, won't allege [fol. 65] that and he won't offer any proof as to it.

I feel that we are in this position: The court here is not the Attorney General and the court is not trying de novo the discretion of the Attorney General. All that the court here is to do is to examine and see if there has been an abuse of discretion by the Attorney General.

Now, we have offered the allegations in the return that these people are active Communists and that they are security risks. Now then we have given the evidence upon which that is based. They have come forth with nothing.

The Court: Well, if you want to file that additional affidavit I will have to await until it is filed before I can make any ruling.

Mr. Porter: That is only in the one case, your Honor.

Mr. Binns: That is just in the Carlson case, your Honor, and I possibly can have it down here by 5:00 o'clock.

The Court: I shall not be here at 5:00 o'clock but I shall be here tomorrow morning.

I feel if that affidavit is filed the Government's pleadings are sufficient and that the Potash case comes into play and that then the burden shifts.

I assume that counsel are going to take the same position as before—they are not going to offer any evidence, is that correct?

Mr. Porter: We are ready to submit in the Carlson case, [fol. 66] your Honor.

Mrs. Rosenberg: And in the Stevenson case as well, your Honor.

The Court: I shall not make any formal ruling until after the affidavit has been filed. After the filing of that affidavit then I will determine whether or not there is sufficient evidence here to indicate the Attorney General or his assistants, have exercised their discretion in the matter and the burden then shifts to the petitioners to establish the allegations of their petition that there has been an abuse of discretion.

I realize, of course, that there will be a notice of appeal filed and then the Circuit Court can again re-examine this case and determine whether or not I have properly interpreted their decision; but I am wondering whether the Government would not make some concession as to the release of at least two of these petitioners during the time

of appeal. I realize I can release them myself but I was wondering if the Immigration Department wouldn't join with me, as far as Mrs. Stevenson is concerned and Mr. Carlisle, whose condition of health has been raised here. I was wondering if he couldn't be released on reasonable bond pending an appeal.

Mr. Binns: Your Honor, we are in this position with this claim of illness by Carlisle. As I understand from Mr. Del Guercio it is claimed he has tuberculosis and that is some-[fol. 67] thing that can be isolated and the doctors can be quite positive about it. They are positive he doesn't have it. He has been examined by the public health service.

The Court: Yes, and I have had people here where a cardiograph showed they were in perfect health but fell dead before they got out of the office.

Mr. Binns: We feel there is no basis for it and we feel there is no illness here to be considered.

Now, as to releasing two of these people on bail, your Honor, there have been discussions in which Mr. Landon has participated, as I understand, with the attorney from New York, Carol King, and the outcome of that conversation, as I understand it, was that he was not going to release them on bail. He has communicated with the Attorney General and the Attorney General's attitude is that he is not going to change his position.

The Court: After I make my formal ruling I will hear from counsel on an application if there is a question of this man's health being involved, if the alien is willing to pay the expense. If he is the court would appoint an independent physician to make an examination. If he is ill it seems to me he would not be very harmful if he was at liberty. I don't want to be a party to confining an individual and thereby impairing his health.

Mr. Fleishman: If your Honor please, in connection with [fol. 68] the Carlisle illness matter, just so the record is completely clear on that point as to what our assertion was, the assertion was before Mr. Landon that Mr. Carlisle did have tuberculosis and that prior to the time he was arrested and put in custody it had cleared up and it was in an arrested state.

I spoke to his doctor who told me that, as we all know, it can easily flare up again especially when the diet is inadequate as I believe it to be in this case, and especially in

view of the fact that for some six weeks now Mr. Carlisle has had continuous bronchitis which is a very, very dangerous symptom.

Now it well may be that the X-rays taken by the Government do not disclose present active tuberculosis and it may also be the fact that it is on coming. In other words, the X-rays don't show it now. Because of that that doesn't mean he is not in a serious condition, and it is the serious condition that we are now urging be considered by your Honor.

Mrs. Rosenberg: As for the Stevenson matter, your Honor, although the Attorney General is reluctant to release her, I don't think that should be binding on this court.

The Court: I realize it is not binding. I have been trying to get some concessions out of them without having to make a ruling in that respect. But I feel that as far as Carlson is concerned I would not give any serious consideration to an application for bail pending an appeal in the event [fol. 69] that the affidavit is filed.

I have indicated in a sense how I am going to rule and I have considerable sympathy for anybody who is being held in custody while a legal battle is in progress. They are the victims of a legal contest while we are trying to determine what a law means.

If the affidavit in the case of Mrs. Stevenson is not very strong I will consider an application for bail. That is the reason I wanted you to weigh that particular angle.

In any event the matter will stand submitted and I will make an order as soon as the affidavit is filed.

I want to make this clear if I haven't already made it clear that I am not passing upon the question of whether or not these people are properly designated as dangerous aliens. All I am passing upon is whether or not the Attorney General has had facts before him upon which he could exercise his discretion.

As a side remark, this case demonstrates the weakness of our legal processes during periods of national emergency. I feel that during such times (having in mind the experience of World War II) our courts represent the weakest link in the protection of the nation from within. I refer particularly to the violations and prosecution thereof, of price and rent regulations.

The courts were the weakest link in the enfofcement of

[fol. 70] those laws because they did not impose sufficiently severe penalties to make them effective. I think that practice weakened the national structure during those times. And now we are facing this question of internal security, and this case, it seems to me, is a splendid example of what we are to expect if we are really threatened with internal upheaval.

During this period of national emergency the courts must take judicial notice that the president has issued a proclamation declaring a national emergency. And likewise we must take judicial notice of the happenings of the day.

I feel the courts should not be a stumbling block to the nation's effort to protect itself from its enemies within. On the other hand I believe that during normal times our courts represent the greatest bulwark conceivable to protect our citizens from encroachment on their civil liberties.

From cases I have read and studies I have made there is indicated considerable inability on the part of our courts to adjust themselves to the emergency and speedily and expeditiously dispose of matters so that the parties may know exactly where they stand. In the presence of a national emergency our cumbersome procedure stays the hand of the executive branch of government in its effort to protect the nation from its enemies.

Considerable delay in this case could have been avoided had this court approached the problem presented, from the [fol. 71] point of view taken by the Circuit Court of Appeals, and ordered these affidavits be filed when the proceedings were first initiated. Because of that it is necessary to retrace our steps and go through the whole procedure once more.

The aliens do not know where they stand. The executive branch of the government does not know whether the courts are going to permit it to take the steps necessary (as provided by Congress) to maintain internal security.

I am making these observations because of the speed with which the appeal of the decision in this case of only a few days ago, reached the Circuit Court, the promptness of that court's consideration and decision therein, all of which proves it can be done. If the same expeditious treatment were given to all cases involving national policies the parties thereto would know within days instead of years, just what rights they have.

Mrs. Rosenberg: Your Honor, may I urge the release of Mrs. Stevenson at this time in view of the fact that the affidavit in question has not reference to the Stevenson matter at all.

The Court: I am not going to make any ruling until I dispose of the entire matter.

Mrs. Rosenberg: But, your Honor, since your Honor already indicated ——

The Court: Until I have formally denied your petition. [fol. 72] Then when you have filed your notice of appeal I will be glad to give your application consideration.

As I indicated the other day I feel the petitions in three of the cases were not as strong as the one in the Carlson case and might present a different problem and the court, with that in mind, may feel inclined to, if there can be some assurances that during appeal these people will report and not participate in activities of this kind as charged here, certainly I am going to give it serious consideration. I have always said I am soft when it comes to keeping a woman in jail. But on the other hand there are some women lawyers I would like to put in jail for a while.

Mrs. Rosenberg: I wish that softness, your Honor, could be produced at that time in favor of the petitioner who already has been in jail for nearly three months.

The Court: I realize that but I am not going to make any order tonight nor until I have formally decided this case. It will stand just as it is and when the affidavit is furnished me I will make the order. I am not going to write an opinion. I have stated here the way I feel and the Circuit Court will have the record before it and all I ask is when it gets to the Circuit Court, if they feel the affidavits are insufficient, that they reverse me with directions to release the petitioners.

The case will stand submitted.

[fol. 73] (Whereupon, at 4:15 o'clock p.m. the above entitled matter was concluded.)

[fol. 74] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE BEN HARRISON, Judge Presiding

No. 12491-BH Civil

In Re: FRANK CARLSON, also known as SOLOMON SKOLNICK

No. 12492-BH Civil

In Re: MIRIAM CHRISTINE STEVENSON, etc.

No. 12503-BH Civil

In Re: HARRY CARLISLE, also known as HARRY CARLYLE

No. 12505-BH

In Re: DAVID HYUN

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California

January 11, 1951

Appearances: (As heretofore noted.)

[fol. 75] LOS ANGELES, CALIFORNIA, THURSDAY,
JANUARY 11, 1951—2:00 P.M.

The Court: You may proceed.
The Clerk: No. 12491, In Re: Frank Carlson.
12492, In Re: Miriam Christine Stevenson.
12503, In Re: Harry Carlisle.
12505, In Re: David Hyun.
Mr. Binns: The Government is ready.
Mr. Porter: We are ready, your Honor.
Mrs. Rosenberg: Ready.
Mr. Fleishman: We are ready.
Mr. Tyre: Yes, your Honor.

The Court: Gentlemen, I have called this additional record may be complete.

Among other things the Circuit Court directed me to take notice of the delays in the hearings and I want to ascertain the actual facts and causes for the delays and I have asked the hearing officer to be present. Is he present?

Mr. Binns: Yes, your Honor. There are two hearing officers present. One man has three cases and one man has one case.

The Court: I want them sworn.

Mr. Porter: Before your Honor proceeds I would like to make the record clear that in accordance with the allegations of paragraph 2 of the traverse in the Carlson case, it [fol. 76] is our position in that case that the question of so-called delays at the hearings under the warrant of arrest in the Carlson case, is irrelevant and immaterial in this matter and doesn't have any bearing whatever upon the issues in this habeas corpus proceeding.

The Court: All I know is that the Circuit Court told me to take note of it and I am going to give the Circuit Court the benefit of the record.

Mr. Porter: I would just like to say on that, your Honor, if I may, as I read the opinion what the court is saying there is that the Attorney General may not exercise discretion under any circumstances to hold a person for an unreasonable length of time, having in mind a standard or rule such as that followed by the court in cases such as Caranica (phonetic) versus Nagel and the line of cases related to that.

Where an attempt is made to hold an alien under a final order of deportation which has not been effectuated by the Government, the rule is a familiar one that the Government may not hold a person for what the courts will find to be a more than reasonable length of time under such circumstances, and I think that that is the consideration to which the Circuit Court of Appeals was referring in this case.

The Court: I don't know. Under the Security Act I think they can hold them indefinitely.

Mr. Porter: I might just add this, your Honor, that in [fol. 77] the argument to the court I recall a question being asked by one of the judges on this point and the expression of an opinion by him. I don't remember now which judge it was. It was to the effect that the issue before the court

might have been different had the case been presented say 60 or 90 days subsequent to the time when it was actually argued, the implication being that such a lapse of time might be an unreasonable one regardless of other issues in the case.

I think therefore that that is what the Circuit Court had in mind and in any event it seems to us that the question of so-called delays at the administrative hearings does not bear upon any of the issues here.

The Court: But it will not do any harm and I am going to put it in the record.

Mr. Porter: And we therefore object to it.

The Court: When you say "we" are you speaking for all counsel?

Mr. Porter: I speak for Mr. Carlson in this case. We object to it on the ground of irrelevance and immateriality and for the reasons which I have indicated.

Mrs. Rosenberg: I join in that objection, your Honor, in the case of Mrs. Stevenson.

The Court: Do all parties join in that objection?

Mr. Fleishman: Yes, your Honor, I join in it.

The Court: Swear the witness.

[fol. 78] JOHN B. BARTOS, called as a witness by the Court, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: John B. Bartos.

Direct examination.

By The Court:

Q. What is your occupation?

A. I am a hearing officer for the United States Immigration and Naturalization Service.

Q. For what length of time have you been so occupied?

A. Well, on the last designation it has been since November but I have been hearing deportation hearings since 1934.

Q. Which one of these cases has been assigned to you for hearing?

A. Mr. Skolnick or Carlson, and Mrs. Stevenson and David Hyun.

Q. We will take the Carlson case. There is a record here that there have been some hearings set and there have

been some delays. When was that case first set for hearing under the last warrant?

A. Under the last warrant it was set for November 21st, 1950.

Q. Was it heard on that day?

[fol. 79] A. Yes, sir.

Q. There was a hearing?

A. There was a hearing on that date. There are 44 pages of testimony and on motion of counsel it was continued until 9:00 a.m. on November 28, 1950.

Q. Which counsel?

A. Counsel Porter.

Q. Then what happened on that date?

Mr. Porter: One moment please, sir.

The Witness: Yes, sir.

Mr. Porter: I am having great difficulty in hearing both the witness and the court, your Honor. If you could make it easier to hear it would be a great accommodation.

The Court: If counsel desires they may move over closer to the witness.

Mr. Porter: I will be happy to.

The Court: But I can't guarantee how good your ears are.

Mr. Porter: So far as I know my hearing is normal and my attention is riveted on what is proceeding from the bench.

By The Court:

Q. What happened on the 28th?

A. On November 28th substitute counsel appeared on behalf of Mr. Porter and made a motion for a further continuance.

Q. Who was the counsel that appeared?

A. Mr. Fleishman, Stanley Fleishman appeared and motioned on the ground that Mr. Porter could not be pres-[fol. 80] ent because he needed to go to San Francisco to argue this case before the Circuit Court of Appeals on December 1st, 1950.

Q. And when was it continued to?

A. Until 9:30 a.m. December 14, 1950.

Q. And what happened on that date?

A. On that date a further hearing was held, pages 48 to

70, and on that date it was further continued on motion of counsel to 9:30 a.m. January 3rd, 1951.

Q. You say "on motion of counsel". Which counsel do you mean?

A. Motion of counsel Porter.

Q. And on January 3rd what happened?

A. On January 3rd a short hearing was held. Counsel appeared and motioned for a further continuance because the respondent hadn't had an opportunity to secure certain documents which would be of use in presenting his case.

He was granted a continuance to February 13, 1951 and notified that the date of February 13th, 14th and 15th were being set aside in order that the case might be terminated.

Mr. Porter: At this point on behalf of petitioner Carlson I would like to move to strike all of that testimony upon the ground it is incompetent, irrelevant and immaterial and doesn't tend to establish or disprove any issue in this proceeding.

[fol. 81] The Court: The motion is denied. That is all the questions I have to ask. Does counsel desire to ask any questions?

Mr. Binns: No questions from the Government, your Honor.

The Court: So far as Carlson is concerned have you any questions, Mr. Porter?

Mr. Porter: No, no questions, your Honor.

Mr. Binns: I might ask one question, your Honor.

The Court: Very well.

Mr. Binns: Was the Government ready to proceed on each of these dates, the Immigration Service?

The Witness: I was ready to proceed to hear it on each of the dates and the examining officer was present to proceed on each of those dates.

Mr. Binns: And were the defendants' witnesses present?

The Witness: There were not witnesses except Mr. Carlson.

Mr. Binns: That is all of the other Government witnesses testified?

The Witness: Mr. Carlson is the sole witness in the case.

The Court: And who was the other alien that you had?

The Witness: Mrs. Stevenson

By The Court:

Q. When was that first set?

A. Under the new warrant?

[fol. 82] Q. Yes.

A. It was set for November 30, 1950 at 9:30 a.m.

Q. What happened on that date?

A. On that date substitute counsel for Mrs. Rosenberg appeared, counsel Miss Esther Chandler and motioned for a continuance on the ground that Mrs. Rosenberg was enroute to San Francisco to argue the case before the Circuit Court of Appeals on a writ of habeas corpus.

Q. When was it continued to?

A. It was continued to 9:30 a.m. December 6, 1950.

Q. And what happened at that time?

A. At that time all parties present, counsel Rosenberg motioned for a further continuance That motion at that time was denied and the case was proceeded with. 37 pages of testimony were taken and on further motion of counsel she was granted a continuance until December 11, 1950.

Q. What happened on December 11th?

A. On December 11th counsel appeared, testimony was taken, pages 38 to 86, and the hearing was recessed on that date until 9:30 a.m. December 12, 1950.

Q. What happened on December 12?

A. On December 12 Mrs. Rosenberg called me on the phone and asked for a continuance because she needed to go to Beverly Hills to take a deposition.

I referred her to the District Directors and if he author-

[fol. 83] ized any continuance it would be granted. I believe she understood that a continuance was authorized and no hearing was heard on that day. However later that day, on the 12th, she called me and we set the date for December 14, 1950, I believe, at 2:00 p.m.

Q. What happened at that time?

A. We took further testimony in the case and the case was recessed at the close of business until 9:30 a.m. on December 15.

Q. On the 15th what happened?

A. On the 15th the hearing was resumed and at the close of business on that date, on motion of counsel due to another cause for deportation having been lodged, a continuance was granted counsel to assemble evidence to meet that cause

and also counsel wished to secure testimony previously given by Government witnesses in another case.

Q. When was it continued to?

A. It was continued to January 5, 1951, but it was taken off calendar to ascertain from the Commissioner as to whether or not the testimony she wished of the Government witness would be furnished her by the Government or in what way it might be furnished her.

Q. And it is now off calendar?

A. It is now off calendar pending hearing from the Commissioner.

[fol. 84] Q. Did you have anything to do with the hearing in the Carlisle matter?

A. No sir; David Hyun.

Q. Did you have David Hyun?

A. Yes, sir.

Q. When was that case originally set under the new warrant?

Mrs. Rosenberg: May I make a motion at this time, your Honor, if you included, to strike from the record all the testimony given in that case.

The Court: Yes, the motion is denied.

The Witness: That hearing was set for November 22nd, 1950 and was opened on that date.

By The Court:

Q. I believe there is no dispute in the Hyun matter —— that is, that it was continued at the request of the Government for the purpose of taking depositions, is that true?

A. That is true, yes, sir.

Q. There have been no delays at the request of counsel for the alien in that case?

A. No. In that case he made a motion for a continuance at the beginning of the hearing but that was denied.

Mr. Binns: We would like to complete the record in that matter, your Honor. It will only take a minute.

The Court: All right.

[fol. 85] By The Court:

Q. It was set for November 22nd?

A. Yes, sir.

Q. And then what happened?

A. 17 pages of testimony were taken and on motion of the examining officer to take depositions in Honolulu the case was continued and operations were set in motion to take the depositions as requested.

Q. And it has been hanging fire since then. Have you gotten the depositions?

A. Yes, sir; I understand that the depositions were taken on December 18.

Mr. Tyre: Just a moment. I will move to strike any testimony along those lines. That testimony is this gentleman's conclusion, your Honor.

The Court: All you know is that depositions were ordered.

The Witness: I have a telegram here that said they were mailed to San Francisco.

The Court: That is not evidence.

The Witness: Very well, sir.

By The Court:

Q. Was that information received by you in the ordinary course of business in your office?

A. Yes, sir.

Q. Addressed to you?

A. Yes, sir; this was furnished to me today.

Q. Has this case been set down for any further hearing?

[fol. 86] A. Not as yet. The depositions have not been received.

The Court: Do you wish to make the same motion to strike?

Mr. Tyre: I would like to ask a couple of questions.

The Court: Very well.

Cross examination.

By Mr. Tyre:

Q. You say that counsel moved for a continuance at the outset of the hearing on November 22nd? Do you recall the length of time for which counsel asked for the continuance, Mr. Bartos?

A. I have it here, counsel. Counsel asked for a short continuance.

Q. Do you recall counsel said that 10 days or two weeks would be an adequate time?

A. I believe that is correct.

Q. Do you remember whether or not the basis for the motion for continuance was to become acquainted with the regulations which had been issued shortly prior to that hearing by the department?

A. You said you simply had not had an opportunity to prepare for the case, to even study the warrant let alone the law.

Q. Do you recall also the statement that the regulations pertaining to that hearing had only been issued a few days [fol. 87] prior to that particular hearing and that counsel wished to become familiar with the regulations?

A. That is correct, counsel.

Mr. Tyre: That is all, your Honor.

The Court: That is all.

Q. By Mr. Binns: Do you know whether or not Mr. Tyre was notified of the depositions to be taken in the Hawaiian Islands?

A. I know ——

The Court: How would he know whether he was notified?

Mr. Tyre: I will object to that. No proper foundation has been laid.

Mr. Binns: I merely asked if he knew.

The Court: I assume as hearing officer he didn't have anything to do with the taking of the depositions, did you?

The Witness: No, I did not.

The Court: That is a matter that would be up to the Immigration officers themselves, their counsel or representative.

The Witness: That is right. I do know that there was a letter written by the District Director at Honolulu to the Commissioner stating the date that the depositions were to be taken and telling the commissioner that a letter had previously been sent airmail special delivery registered with a return receipt, directed to counsel and the alien [fol. 88] notifying them of the date that the depositions would be taken.

Mr. Tyre: I move to strike that response, your Honor, as not being responsive to any question before the witness

and on the further ground that it states a complete conclusion of the witness and no proper foundation.

The Court: That motion will be granted. Any further questions?

Mrs. Rosenberg: I would like to ask a few questions.

By Mrs. Rosenberg:

Q. Mr. Bartos, of the six dates set in the Stevenson hearing, is it not true that of those six two were requested by the hearing officer, one on December 11 and one on December 14?

A. I believe I said that—yes, that is correct. The 11th was recessed to the 12th and the——

Q. And the 14th recessed to the 15th?

A. And the 14th was recessed to the 15th. I believe I stated that. That is proper, Mrs. Rosenberg,—that is correct, Mrs. Rosenberg.

Q. And that one of the hearings set was upon Mr. Landon's suggestion communicated to you that the deportation hearings would be held in abeyance until the Circuit Court had ruled—that was with regard to the December 12th hearing, is that not so?

A. That may be something that Mr. Landon told you but Mr. Landon didn't get in touch with me as to that fact.

[fol. 89] Q. Did Mr. Landon call you, Mr. Bartos, on December 12 indicating to you that he had granted to me a continuance on the basis of the Circuit Court ruling which was expected very shortly?

A. No.

Q. Did you talk with Mr. Landon on December 12th with regard to the December 12th hearing in this case?

A. Yes; I called Mr. Landon.

Q. You called Mr. Landon?

A. Yes.

Q. And can you tell us the import of that conversation?

A. I asked what had gone on—that I had expected "to hear from you" or he and that I hadn't heard.

Q. Well, why did you expect to hear from him? On what basis did you have that expectation?

A. Because when you called me I recommended that you call him and I expected to hear from either one of you or the other as to whether you were going to appear.

Q. That is right. And didn't Mr. Landon get in touch with you at all or did you get in touch with him on that date?

A. I got in touch with Mr. Landon because so much time had gone by I wanted to know what was happened.

Q. I see. Did Mr. Landon tell you of any conversation he had had with me on that date?

A. Yes. He said that he had. I don't recall the exact [fol. 90] conversation but he said that he had agreed more or less to a continuance with you.

Q. So that of the six cases we have two recesses and one based on the conversations with Mr. Landon as to a continuance on that point?

A. Yes, but that was at your request because you had called me.

Q. That is right. I merely wanted to establish——

The Court: Let us not get into an argument.

By Mrs. Rosenberg:

Q. I merely wanted to establish the basis of it.

The Court: Don't argue.

By Mrs. Rosenberg:

Q. Mr. Bartos, is it true also that on December 15 when you granted the continuance it was on the basis of meeting the new charges, this continuance being one as a matter of right to the respondent?

A. That is right.

Q. So that of the six we have disposed of five in that fashion.

Mr. Binns: I object to that, your Honor, as argumentative. I will withdraw the objection.

The Court: We have to have a certain amount of argument.

Mrs. Rosenberg: That is all.

The Court: That is all. Call the other hearing officer.

[fol. 91] Roy Waddell, called as a witness by the Court, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Roy Waddell.

Direct examination.

By the Court:

Q. Were you the hearing officer in the Carlisle matter?
A. Yes, sir.
Q. Under the new warrant?
A. Yes.
Q. When was that first set for hearing?
A. November 17, 1950 at 1:00 o'clock.

Mr. Fleishman: I am sorry but I can't hear the witness, your Honor.

The Court: It is strange that all you people went deaf on one day.

Mr. Fleishman: It is very difficult, if your Honor please.

The Court: Speak a little louder.

The Witness: November 27, 1950 at 1:00 o'clock.

By the Court:

Q. What happened on that day?

A. The hearing opened and Counsel Fleishman immediately moved for a continuance on the basis that he had not had an adequate response to a request for a bill of particulars; that he was not ready to proceed in view of a [fol. 92] lack of opportunity for sufficient consultation with his client, who was then at Terminal Island detention quarters, and on the further ground that an action had been brought in San Francisco testing the constitutionality of the McCarran Act and he desired to have the hearing continued awaiting the outcome of that action.

Q. When was it continued to?

A. Well, we proceeded through the balance of the day over his objection. It was continued to November 28, 1950 at 1:00 p.m.

Q. Simply a recess?

A. That is right, an adjournment or recess.

Q. And did you have further hearing on the 28th?

A. On the 28th at 1:00 o'clock we had a further hearing. Counsel again objected to being forced to proceed with the proceeding at that time and at the close of the day, having cross examined one Government witness, he announced that he was not ready to complete his cross examination and I

proposed that we continue the case until the 30th of November when the witness would again be available and Mr. Fleishman, the attorney, announced that he had a prior commitment in San Francisco on the first of December and that this date would conflict and therefore I adjourned without fixing a date.

Q. Has there been another date fixed?

A. Yes. The docket officer set it again for hearing [fol. 93] December 15, 1950 at 9:30.

Q. What happened at that time?

A. Counsel then requested a continuance on the ground that he was not adequately prepared to cross examine the witness; that his client was still in detention but we proceeded through the balance of that day.

Q. What happened after that?

A. And then we recessed until the following date, December 14, 1950, at 11:30 a.m. That was a very short session. Counsel indicated that he was unable to proceed further with the cross examination of the witness without transcripts of the testimony which the witness had given in two other deportation cases and the matter of making those transcripts available to him was taken under consideration by the District Director, and I was informed through official channels that counsel would be given further opportunity to cross examine the witness and therefore I adjourned the hearing again.

Q. To what date?

A. And fixed no date awaiting the availability of the transcript which he had requested.

Q. Any questions by counsel?

Mr. Fleishman: Yes, just a few.

Cross examination.

By Mr. Fleishman:

Q. Mr. Waddell, do you recall the hearing of December [fol. 94] 14th which was the last hearing we had?

A. Yes.

Q. That was a carry-over from the hearing of December 13, was it not?

A. That is correct.

Q. And do you remember on December 13 when we finished at the end of the day you declared that we would have just a morning session on December 14th?

A. I don't recall that, Mr. Fleishman.

Q. Do you have before you the proceedings of December 13th?

A. I have a part of the transcript. I don't know how far that went.

Q. If you will just look at the last page of the December 13th hearing I think you will find that that is discussed there.

A. No, it is not. It does not carry through the 13th.

Q. You do not have up to the 13th?

A. No.

Q. I will ask you now if I have refreshed your recollection when I ask you if you now recall that on December 13th, at the end of the day, you said that on December 14th we would have just a morning session. Do you remember that?

[fol. 95] A. No, I don't recall that but it is possible.

Q. Do you remember we were supposed to start that day at 10:00 o'clock on December 14?

A. No, I do not recall that.

Q. Don't you remember when I came in I asked you why we weren't commencing on time and you told me that Mr. Leach was otherwise occupied?

A. Oh, yes, I believe the witness was involved in several actions. Now I remember, Mr. Fleishman, yes.

Q. Mr. Leach was testifying in two cases at the same time, isn't that correct?

A. That is right; there was a short delay.

Q. And you knew as a matter of fact that Mr. Leach was going to be occupied in the afternoon of the 14th and that was why we couldn't go on all day on the 14th of December?

A. I believe that is correct.

Q. So when the session ended on December 14th at 1:00 o'clock, which was at noon, that was all the time you had set aside for that session, isn't that correct?

A. I don't recall, Mr. Fleishman.

Q. Don't you remember, Mr. Waddell, that as a matter of fact I said that I was prepared to go on for the rest of the day but we had arranged—that I had questions to go

on with further cross examination, but we had previously arranged it was going to be a half-day session and then the [fol. 96] half day was over and we therefore adjourned?

A. I recall one day.

Q. I am talking now about December 14 which was our last session, Mr. Waddell. Don't you remember that?

A. No. I remember it was a very brief session. That is the extent of my recollection.

The Court: You wouldn't say that isn't true?

The Witness: No, I wouldn't say it isn't true.

Mr. Fleishman: I think that is all.

The Court: That is all.

I find from the affidavits and the return that there was sufficient evidence before the Attorney General upon which he could exercise his discretion and that having exercisd that discretion the burden now shifts to the aliens and petitioners herein, to establish by competent evidence the allegations of their petitions wherein they state in effect that the action of the Attorney General in retaining them in custody was arbitrary and capricious.

I want each of the petitioners herein and each of the aliens to have an opportunity to express themselves, and I am offering each of the aliens an opportunity to take the stand in their own behalf.

Mr. Porter, do you desire to offer any evidence on behalf of the petitioner Frank Carlson?

Mr. Porter: If your Honor please, our position in the [fol. 97] Carlson case is that the showing by the respondent District Director is insufficient as a matter of law to justify the detention and as a consequence the allegations of the petitioner established an abuse of discretion and we think there is no issue as to which it is necessary or proper for us to go forward with evidence in the Carlson case.

We are prepared to submit on the present state of the record.

The Court: I am going to call Mr. Carlson to the witness stand. Mr. Carlson.

Mr. Porter: I want to object to the action of the court in calling the petitioner to the stand in the face of the statement which I have just made with respect to our position in the case and object to the propounding by the court of questions to the petitioner upon that ground.

The Court: Well, the petitioner does not have to testify but I don't want it said that I haven't given him a full opportunity for a hearing in this court. In view of the allegations I don't want it said that I have denied him an opportunity to be heard and I will ask you, Mr. Carlson, without being sworn, do you abide by the statement of your counsel?

Petitioner Carlson: I would like to accept the advice of my counsel at this time.

The Court: You would like to what?

Petitioner Carlson: I am accepting the advice of my [fol. 98] counsel and decline to testify at this time.

The Court: All right, that is all.

Mrs. Rosenberg, do you take the same position that Mr. Porter does?

Mrs. Rosenberg: Yes, your Honor, I do. The petitioner here has set forth facts which have been undenied. The affidavit and the return of the Government has not shown any fact, your Honor, which was a mandate from the Circuit Court, a fact upon which the Government could rely to detain without bail.

The Court: I would like to call Mrs. Stevenson as a witness and I will give her an opportunity to testify if she so desires.

I would like for her to step forward because I want her to know what her attitude is.

You know the other day there was a question raised with reference to the fixing of bail and unless I know more about these people I am not in position to fix bail.

Mrs. Rosenberg: With regard to the question of bail, your Honor——

The Court: I am not going to argue that point.

Mrs. Rosenberg: At the proper time I should like an opportunity to argue it.

The Court: I want to ask Mrs. Stevenson if she desires to take the witness stand or does she wish to take the posi- [fol. 99] tion that counsel has suggested.

Mrs. Rosenberg: I shall so advise her. It will be up to Mrs. Stevenson.

Petitioner Stevenson: I would like to take the advice of counsel.

The Court: Very well.

Mr. Fleishman, what is your position?

Mr. Fleishman: I take the same position that Mr. Porter stated, your Honor.

The Court: And Mr. Carlisle, do you desire to take the witness stand in your own behalf?

Petitioner Carlisle: I desire to abide by advice of counsel.

The Court: Mr. Tyre.

Mr. Tyre: Your Honor, I would like first, before answering your question if I may, to make a motion so that the record is clear.

I believe at one of the previous hearings Mr. Binns indicated that he wished to file a supplemental return and Mr. Porter and Mrs. Rosenberg and Mr. Fleishman each objected to the filing of such a return.

I think the record will indicate that the court had stated its position on that pretty well and that any further objections to the filing of the return——

The Court: In other words you want your record protected?

[fol. 100] Mr. Tyre: I want the record to show that I object to the filing of a supplemental return on these grounds: One, that in a return to a writ of habeas corpus it is the duty of the Government to file whatever facts it has at hand and wishes to allege in that original return; that a hearing on a return on a writ of habeas corpus is by its nature a summary proceeding and should be disposed of as rapidly as possible. I am also aware of the fact that your Honor desires to give each of the petitioners an opportunity to be heard. However, I do believe nevertheless, that in a writ of habeas corpus matter, especially a matter of this type where Mr. Hyun has been in jail as long as he has, that it was incumbent on the Government to file whatever it had in its original return.

The second ground is that the petitioner stated at the morning session on that day before the traverse was filed just what the traverse would contain, namely, a re-allegation of the allegations of the original petition for the writ, so that no one would be taken by surprise, and that afternoon when we came back Mr. Binns again asked that because of the nature of this traverse he wished to give the matter further consideration and if necessary to file a further return, which I think was inconsistent with the

morning's session since he had already been apprised of what the traverse was to contain at this time, therefore, I [fol. 101] wish to make the motion that the supplemental return in this case be stricken.

The Court: The motion will be denied.

Mr. Tyre: I wonder if I might now then, your Honor, have a few minutes of a recess to discuss the problems imposed in view of your Honor's ruling on my motion?

The Court: Yes, I will take a five-minute recess.

(Short recess)

The Court: You may proceed.

Mr. Tyre: I have discussed the matter with David Hyun and he asked me to take the position that he does not wish to testify.

The Court: He does not?

Mr. Tyre: He does not.

The Court: Mr. Hyun, is that your wish?

Petitioner Hyun: Yes, I do not want to testify at the present time.

The Court: You understand I am giving you an opportunity to testify if you wish?

Petitioner Hyun: Yes, I do.

The Court: And I understand counsel for the petitioners have no evidence to submit to the court? They are going to rest entirely on the record presented by the Government's return and affidavit?

Mr. Porter: That is correct, your Honor, together with our demurrers thereto and other objections in the record. [fol. 102] The Court: The court has heretofore indicated that it feels the Attorney General has made sufficient showing as a basis for the exercise of discretion, and that the burden shifts to the aliens to establish by clear and convincing evidence that the acts of the Attorney General or his authorized representatives, have been arbitrary and capricious.

The petitioners declining to offer any evidence the court finds they are not entitled to a petition for a writ of habeas corpus and directs the United States Attorney to prepare the necessary findings to the effect that I find there has been no abs*ue* of discretion by the Attorney General or his representatives, and on the basis of that finding the peti-

tions for writs of habeas corpus are denied and the writs discharged.

Mr. Porter: If your Honor please, we intend, of course, —that is in the Carlson case, to file notice of appeal at once and we will desire to make application for bail pending appeal to your Honor.

I have an idea that such applications may be made in other cases. I wondered if your Honor would hear such applications now?

The Court: Yes, and I will give you my answer now.

I will not grant bail in any of these cases. I have given each one of the aliens an opportunity to take the stand and I have nothing before me to indicate that they do not present anything but a clear and present danger to the security [fol. 103] of the United States.

In view of that and in view of the fact that they have shown no evidence to the contrary or produced any evidence to the contrary, I feel they should not be at large and I will give you an order to that effect after you file your notice of appeal.

Mr. Fleishman: If your Honor please, in the Carlisle case there is also the question of his health. I have two affidavits, one from Mr. Carlisle's doctor indicating that Mr. Carlisle in the past had tuberculosis and that he was supposed to be put on—was supposed to have a high caloric diet, which diet is set forth in Dr. Lavit's (phonetic) affidavit.

Also Dr. Lavit, having been informed by me that Mr. Carlisle has had a continuous cough for the past six weeks, informed me and then put in his affidavit the fact that this indicated a general weakening of the condition of Mr. Carlisle, which might very well lead to a new on-set of tuberculosis or again using his words, "might even indicate that he already does have it."

I also called to the doctor's attention the fact that Mr. Carlisle has lost five pounds since he was in custody and the doctor again said that that would indicate a general weakening of his condition which may lead to a new on-set of tuberculosis if it already has not come on.

[fol. 104] Now, I have also prepared an affidavit of my own based upon information given to me by Mr. Carlisle, setting forth, first, that he has lost five pounds since he has

been taken in custody; secondly, that he has had a cough continuously for the last six week and, third, I have set forth the diet that he has been getting at Terminal Island showing a wide discrepancy between—gap between what he is getting and what the doctor said he should get in order to prevent an on-set again of tuberculosis.

So that on the basis of Mr. Carlisle's health at this point I would most respectfully request bail pending appeal at least.

Mr. Binns: Your Honor, I have here a letter from Dr. F. C. Stewart, the medical officer in charge of the Federal Security Public Health Service in San Pedro who examined Mr. Carlisle, and the letter is dated January 8.

Dr. Stewart states in the letter:

> "There is no medical evidence to indicate any special diet or unusual precaution to prevent a recurrence of alleged chest pathology while detained."

The Court: Now, counsel, I have the authority to employ a doctor but I am willing to have these facts submitted to an independent doctor whom I will name——

Mr. Binns: We have no objection that at all.

The Court: And if that doctor feels that confinement is [fol. 105] injurious to the petitioner's health and we can have some assurance that his activities during the appeal will be such that he will not be detrimental to the country during the period I will be glad to consider it.

Mr. Fleishman: The petitioner of course is most anxious to have independent medical examiner examine him with reference to whether his confinement is injurious or not.

The Court: What is that?

Mr. Fleishman: The petitioner would be very anxious to have an independent medical examiner appointed by the court.

The Court: In other words, here you have a doctor on one side and another doctor on the other side and as usual one says his health will be improved by confinement and the other says it will be injurious. But if confinement is injurious to this man's health and I can be given some kind of assurance that his activities during the appeal will not be detrimental to the welfare of the country I will be glad to consider his release on bail.

I haven't any doctor in mind. I will have to find somebody who is a specialist along that line to make the examination.

Mr. Binns: The petitioner will, of course, pay the doctor fees?

Mr. Fleishman: Not the petitioner's attorney.

[fol. 106] Mr. Tyre: Yes, sure.

Mr. Binns: And we are also, your Honor, in a position to provide any special foods he might need if that would be brought to our attention.

The Court: I think that letter and your affidavit should be filed.

I will take Mr. Carlisle's application for bail under submission until we can work out the health problem.

I am willing if counsel can agree on a specialist, Government counsel and Mr. Fleishman, can agree on some specialist, to make an examination and take his history and determine what diet he is getting and whether it is detrimental to his health.

Mrs. Rosenberg: Your Honor, I wonder if I might address myself to the point of the release of the petitioner Stevenson on bail pending the appeal because of undue hardship, not alone to her but to relatives involved, particularly her mother who is past 70 years of age and who is in a very nervous condition and agitated condition, which has naturally been aggravated by this particular proceeding and Mrs. Stevenson is her only relative in this country, all others being abroad in distant places, and that she relies greatly on Mrs. Stevenson for the normal comfort and happiness that children afford, and further that she has a son who is now at college, who is working his way through [fol. 107] school and Mrs. Stevenson, the petitioner herein, has aided him financially.

In addition this son has been subjected to attacks of undulant fever since a very early age, 14 I believe, and has just recently had a recurring attack and has been subjected to a great deal of concern over this matter and the actual physical comfort that the petitioner could provide him.

In addition, of course, your Honor, you know that Mrs. Stevenson is married and her husband has been obliged to carry on and do all the housework and attend to the home making and that for these reasons as well as the undue

hardship to Mrs. Stevenson, we respectfully urge that the court release Mrs. Stevenson on bail pending the appeal.

I have, your Honor, an affidavit prepared which sets forth these facts more fully. I should like to submit it.

The Court: You may submit them. Personally I would like to release all of them pending appeal but I know on the other hand that this appeal will be more expeditiously handled if the defendants are confined than if they are at liberty. The last appeal was the fastest appeal I ever heard of in this court. It took only about 60 days.

Mr. Binns: Much less than that, your Honor.

The Court: I mean between the time—approximately 60 days, was it not?

If these defendants had been on bail there wouldn't even be filed the opening briefs.

[fol. 108] Mrs. Rosenberg: I assure your Honor if the petitioner is released pending the appeal we will move as expeditiously as possible. We are anxious also to have the matter concluded.

Mr. Porter: I would like to say for my part, your Honor, that I take respectful exception to your Honor's implication that I, at least as counsel, would not further the appeal merely because my client was enlarged on bail.

The Court: Let me stop you right there, counsel. Just a moment. There was never an attorney in his life who represented somebody that was released on bail that hurried up an appeal, whether it be you or somebody else. As long as they are out on bail and there has been no hearing what is the hurry? You do it and you would do it again and if I were practicing law I would do the same thing. I wouldn't break my neck to have the appeal heard. You are just acting normally, that is all, just as any attorney does and as long as a man is not in jail there is always the hope that something will happen so that he will not have to go to jail. That is one of the things that the courts are constantly confronted with. It is the same proposition with a person who is charged with a public offense. They never want to go to trial. The longer they can put it off the better. That is the usual practice. There is no particular reflection upon you. It is just the way things go.

[fol. 109] Mr. Porter: I want to say that I think that is not a question upon which the court should rest a decision with respect to the granting or denial of bail.

The Court: I am not denying bail on that ground. If the charges here were something other than a charge involving national security there wouldn't be any question about it. If that issue was not present there would be no question about it. But on the other hand you are asking me to release people whom the Attorney General has in effect charged are a threat to our national security and present a clear and present danger to the security of this country. You are asking me to turn them loose. That is the difficulty of my position. If this were a charge of nearly anything else the court wouldn't hesitate to release them. But you have taken the position:

> "Well, the Government has to come in and show its hand; we are going to stand on our rights and we are not going to show our hand. We are not going to make any attempt to prove that the Attorney General acted arbitrarily or capriciously, as you have alleged in your petitions. You want to stand on your rights."

Possibly if I had all the facts in the case I might hold the Attorney General was arbitrary but you want to test it out this way and consequently your clients are having to [fol. 110] suffer the penalty of your method of disposing of this matter. In the meantime you are not going to jail but your clients are.

Mr. Porter: And I am suggesting to your Honor that if that is your Honor's view, your Honor should release the clients from paying this penalty for being represented by counsel who take that position.

The Court: I have asked each one of them and they are perfectly satisfied with their counsel. I am not criticizing counsel for the theory they have adopted in the trial of this case. That is their privilege; but at the same time I have nothing before me upon which I could make a finding that the Attorney General or his authorized representatives acted either arbitrarily or capriciously.

Mr. Porter: That is not the question on the application for bail pending appeal, and I want to say this, unless your Honor is completely free from doubt as to the correctness of your Honor's ruling in this matter, then I submit that the applications for bail should be entertained and I don't honestly believe that your Honor is so completely free from

doubt in this matter. I think your Honor will agree with me that the questions raised here are important and serious and difficult questions. And I think that your Honor has already indicated that he recognizes that a reasonable man or reasonable attorney, if there is such a thing, can and [fol. 111] could take the position that I have taken here.

Now if that be the case then I submit your Honor is actually saying there is a question here—a question of law here and that is the question, as I understand it, considering an application for bail pending appeal.

The Court: And that is a matter of discretion with the court.

I will say this, that I never made a decision in my life where I was absolutely certain of the correctness of it and I don't pretend that my decisions are correct. In fact as in this case, it is demonstrated that I can very easily be in error and I may be in error again but at the same time in the exercise of discretion, when it comes to the question of a person's liberty and a question of national security, I am going to rule in favor of national security. That is just where you and I differ.

I believe if conditions were reversed and you were in my position and you were not a partisan in this proceeding, you would probably do the same thing.

Mr. Porter: Your Honor, if I felt that a reasonable man could conclude that the petitioners Stevenson or Carlson or any one of them could or would do anything pending the appeal which would be inimical to the security of the United States I would understand your Honor's position.

The Court: I don't know about that.

Mr. Porter: But I don't think a reasonable man can take [fol. 112] that position, your Honor.

The Court: I don't know because there has been no evidence submitted to me.

Mr. Porter: There has been no evidence submitted by the Government to support its conclusions, not a whit of evidence.

The Court: I think there is sufficient upon which to comply with the Circuit Court's opinion and they have recognized the Potash decision. They have cited it with approval. You may take this up with them. They may release them. They may if they want to. They may release

them if they want to exercise that discretion. It is their country just the same as it is mine and yours. If they feel in view of these affidavits that they want to exercise their discretion and release these people they may do so.

Mr. Porter: We are talking now about bail pending appeal.

The Court: I know, they can also release them pending appeal.

Mr. Porter: No, they can't, your Honor. I am afraid I have to disagree with your Honor. The rule is very clear, unfortunately, that where the appeal is by the petitioner from an order denying a petition or discharging the writ only the trial court or the district court has the power to grant bail pending appeal.

The Court: I am not so sure about that. I understood that if I didn't grant bail the Circuit Court could and the [fol. 113] immigration officers would recognize that order.

Mr. Porter: I am afraid that is not the case.

Mr. Tyre: I don't want Mr. Porter's discussion of the law binding upon me. I think that is the rule but I am not too sure of it.

The Court: I remember at one hearing I asked Mr. Del Guercio about that. He probably has had more experience on immigration matters than any of us and I think that is the information he gave me at that time.

Mr. Del Guercio: I stated the matter of granting bail was in the discretion of this trial court.

The Court: Not in the Circuit Court?

Mr. Del Guercio: The trial court, yes.

The Court: The trial court only?

Mr. Del Guercio: I don't know about that.

Mr. Fleishman: I would like to make one comment with regard to one of your Honor's remarks, and that is going along with all the major premises, I would like to call to your Honor's attention what I am sure you already know, and that is that in some 42 cases which started out at the same time the aliens have been out for a long period of time without any horrendous effect upon the country.

We have a serious question as we all know. It is going to be litigated and it should be settled and there is conceivable reason that I can see why these four alone, with [fol. 114] perhaps one or two other exceptions, should be

held for this long period of time, whereas the other 42, some of whom could very easily be considered far more of a threat since they are on the executive council and the national committee of the Communist Party—I am referring to some of the cases in New York where 16 were released sometime ago, as your Honor knows.

I have my theory of the law. I think we are right and that is why we are taking this position. We may be wrong and if we are wrong then the penalty should be suffered.

But other than that I think this is—at least in the case of Carlisle whose situation I am most familiar with, a great and grave miscarriage of justice will be had to hold this defendant indefinitely pending the determination of this most serious legal question, again with the background that we have of some 50 cases starting out together on exactly the same legal theory, 42 of whom are out now and as I commented before there has been no ill effect flowing from it.

The Government, I presume, has kept careful tabs on these persons and had they tried anything they would have been apprehended under the law; and again there is no difference at all between those cases where they have been free now practically for the entire period of time and these cases where they have been incarcerated continuously for, well, now, three months.

The Court: Counsel, that is what brought forth the com- [fol. 115] ment I made the other day, that I questioned very seriously the ability of the courts to protect this country in the event of a threat to our internal security. The law to me is clear and I am only trying to follow the law as I understand it. Other judges have understood the law differently.

You must remember that since the arrest of these petitioners the climate has changed considerably. There is nearly as much difference in the climate of yesterday afternoon against that of this afternoon.

Since this occurred we are in what, diplomatically, they call war. The diplomats say it isn't war but we are as a matter of fact in war. There has been a national emergency declared and if our courts are going to release people who belong to that same conspiracy or conspiratorial group that is trying to overthrow the world and conquer the world

then they are going to destroy themselves, but I am not going to commit suicide if I can help it or be a party to it.

Mr. Fleishman: If your Honor please, there is a serious legal question and certainly if the Circuit Court says they should be free I am sure your Honor would abide thereby.

The Court: If they direct me to release these petitioners I will abide by their mandate. There is no question about that. And as far as the three judges are concerned I have absolute confidence in their integrity and their loyalty and their ability, but whether I did or not it would still be my [fol. 116] duty to comply with their mandate and I believe I have done that.

Mr. Fleishman: I am not urging that your Honor change the decision that you have rendered. I am not suggesting that you reverse yourself, but there is a question or was a question, two sessions ago in which your Honor indicated that he then thought that the affidavits were insufficient, at least as to three persons, including Mr. Carlisle.

The Court: But that was before I fully understand the Circuit Court's decision.

Mr. Fleishman: I am not quarreling with that. I am saying that it is a difference of opinion. Your Honor himself has gone through a change, which is legitimate, but we have here again a serious question of law and we don't think we are wrong about it.

The Court: Well, there is always the possibility of the reviewing court holding somebody to be wrong. There is no such thing as being absolutely certain about anything; but as I stated before in view of the nature of the charges in this case and that the Attorney General has claimed they are security risks, I am not going to grant them bail until the Circuit Court advises me to. As to the question of one of the petitioner's health I am taking that under submission.

Mr. Fleishman: May I say this, if your Honor please, and then I will stop. But if there were such great risk [fol. 117] throughout the country the Attorney General had the right to appeal in those cases where the aliens were let loose by district judges.

The Court: I don't know what happened in the other cases and I don't know why the Attorney General in this case didn't take it up and settle the law from this opinion,

but apparently he didn't want to do it on account of the condition of the pleadings.

That has been eliminated and it will give them an opportunity, if the Circuit Court ordered these people released, to take it to the Supreme Court.

Mr. Fleishman: It seems very, very wrong that a person should languish in jail when there is a serious question pending appeal.

The Court: Counsel, you don't get my point of view and that is this. When there is a claim, and I don't know whether it is true or not, a charge hereby the Attorney General that these people are security risks and that their release is dangerous to the security of the United States, until that is either disproved or proved I am not going to release them. My first vote in that respect is for the security of the country.

We have had 42,000 casualties already. These people are better off in custody than those boys over there are. These people are at least safe while the casualties are among the [fol. 118] boys over in Korea who are not only compelled to go over there and fight but are also risking their lives to do it.

I will take the one case under submission, the Carlisle case, and I wish counsel would confer and see if they can agree on some medical doctor or specialist in tuberculosis to examine this petitioner and make a report to the court in that case.

Mr. Fleishman: I have a suggestion now, an independent medical examiner from the State Workmens Compensation Board. Perhaps that would be a good suggestion.

The Court: Suppose you and counsel discuss it. If you can't agree I will find somebody to do it for you.

(Whereupon, at 3:30 o'clock p.m. the above entitled matter was concluded.)

[fol. 119] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 120]. UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12742.

FRANK CARLSON, also known as Solomon Skolnick, Appellant,

vs.

HERMAN R. LANDON, District Director of the Immigration and Naturalization Service, United States Department of Justice, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

PROCEEDINGS HAD IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Upon appeal from

Order of District Court of Jan. 22, 1951.)

[fol. 121] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: STEPHENS, HEALY and BONE, Circuit Judges.

ORDER OF SUBMISSION—Jan. 30, 1951

ORDERED appeals herein argued by Mr. John W. Porter, Mrs. Rose S. Rosenberg, Mr. Stanley Fleishman and Mr. Ben Margolis, counsel for appellants, and by Mr. Walter S. Binns, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision, with leave to National Lawyers Guild, Los Angeles, and Hollywood-Beverly Hills Chapters, to file brief as amicus curiae.

[fol. 122] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: STEPHENS, HEALY and BONE, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS—March 13, 1951

ORDERED that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each cause and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 123] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,742

FRANK CARLSON, also known as SOLOMON SKOLNICK, Appellant,

vs.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service, United States Department of Justice, Appellee.

No. 12,743

MIRIAM CHRISTINE STEVENSON, formerly BURROUGHS, nee KENKEL, alias MIKI ASHTON, Appellant,

vs.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service, United States Department of Justice, Appellee.

No. 12,744

DAVID HYUN, Appellant,

vs.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service, United States Department of Justice, Appellee.

No. 12,745

HARRY CARLISLE, also known as HARRY CARLYLE, Appellant,

vs.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service, United States Department of Justice, Appellee.

OPINION—March 13, 1951

Appeals from the United States District Court for the Southern District of California, Central Division

[fol. 124] *Frank Carlson et al. vs.*

Before Stephens, Healey and Bone, Circuit Judges

STEPHENS, Circuit Judge

The above entitled proceedings in habeas corpus are here upon a second appeal after remand with instructions. The appellant-petitioners, all aliens, are being held by the local

Director of Immigration (Landon) upon instructions from the Attorney General[1] of the United States, pending hearing upon warrants of arrest and for deportation under the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (ch. 1024, Pub. Law 831). Petitioners separately demanded their release through petitions for the issuance of the writ of habeas corpus, and the district court dismissed the proceedings upon a show cause order.[2] We reversed and remanded.

In our opinion in the *Carlson* case, No. 12742, 186 F 2d 183 (1950), we discussed the law which we deemed applicable to all of the cases and held (1) in accordance with the district court that the provision of the 1950 amendment to the Act of October 16, 1918, which refers to the release of aliens under arrest for deportation pending a hearing, requires the exercise of discretion on the part of the Attorney General in providing for release of the arrestee under bail or his detention without bail (Sec. 23), and (2) not in accordance with the district court that in a habeas corpus proceeding for release of the arrestee under bail, where detention without bail has been ordered, and petitioner had alleged in his petition that he was a law abiding person of a substantial character and that he would attend all hearings and was not a security risk, some fact upon which the discretion denying release on bail was based must be revealed by the Attorney General showing that such order was the result of a reasoned conclusion from relevant facts. The Attorney-General's discretion mentioned refers, of course, to discretion exercised or to be exercised upon the question [fol. 125] as to whether the release of appellants on bail would likely endanger the security of the United States and whether they likely would fail to present themselves at the deportation hearings.

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[1] The opinion occasionally refers to the Attorney General where the statute places the authority with him, even though this authority may have been delegated to the Commissioner of Immigration and Naturalization. See Title 8 U.S.C.A. § 156, as amended by the Act of September 23, 1950, c. 1024, Title I, § 23, 64 Stat.

[2] The hearing was upon the show cause order but under stipulation of the parties it was deemed that the writ had issued and the judgment conformed.

We reversed because no such revelation had been made, and remanded for further hearing. The district court complied, issued the writ, and return and supplemental return was made and traversed.

The district court, upon the original hearing, had adhered strictly to the theory that since the return to each petition showed regularity on its face the burden was upon the petitioner to go forward to prove the illegality of the restraint. Each appellant had set out facts in his petition and traverse personal to himself and his family status, as above indicated, which remained undenied, and relied upon the undenied portions of the petition and traverse and gave no oral evidence or further documentary evidence. Each appellant also alleged that his release under bail would not endanger the security of the United States and that the hearings would stretch over many months before being concluded, which latter allegations were put in issue.

At the resumed hearing and after the issuance of the writ, the Director filed his return and amended return, annexing in Carlson's case to the latter an affidavit stating certain facts, most of which were undenied, and the Director relied upon the undenied portions of his returns and affidavit as proof that the Attorney General had properly exercised his discretion in denying bail as to each arrestee. The district court then gave every possible opportunity to the Director and to each arrestee to go forward with evidence, and all refrained. The court then denied each petition and dismissed the writ as to each, and remanded each arrestee to the custody of the Director.

Without restatement thereof, we adhere to our former *Carlson* opinion (186 F. 2d 183 (1950)), and now proceed to the key question:

> Was the district court in error in concluding that the affidavits, together with the undenied portions of the pleadings, failed to show that appellants' restraint was illegal?

[fol. 126] We shall proceed to state briefly the revealed facts as they stood at the conclusion of the resumed hearing. Although the petitions for the writ of habeas corpus were not filed by the arrestees but on their behalf by their attorneys, we shall occasionally refer to them as "petitioners" or as "appellants".

The Appeal of Carlson

Appellant was arrested in 1947 on a so-called alien deportation warrant (Immigration Act of October 16, 1918) and therein was charged with being an alien who, after entry, was found to be *a member of an organization* which believes in and advocates violence to overthrow the government of the United States. He was enlarged under bail. Because of the *Sung* v. *McGrath* (339 U.S. 33 (1950)) decision, and after hearing sessions had been held, another charge was made by the issuance of a warrant under the amendment to the Immigration Act, the Internal Security Act of 1950. The 1950 amendment authorized (and the new warrant conformed) the deportation of an alien who *was, after entry, a member of the Communist Party* of the United States, as distinguished from the former statute which authorized deportation of an alien who *is a member of an organization* advocating overthrow of the government of the United States by force and violence.[3] The latest warrant provided that appellant should be held without enlargement on bail. These proceedings stem from the latter warrant.

It is alleged in the petition that Carlson was born in Poland in 1913 and entered this country at the age of 6 years, has lived in California for the last 15 years, and prior to deportation proceedings had filed his application for citizenship; he is married and is the father of two California-born minor children; there is no basis for fearing that he will commit any act detrimental to the United States should he be freed on bail; the deportation proceedings are liable to continue for many months; he will hold himself in readiness to appear at hearings on the warrant, and he has responded at all hearings on the warrant of 1947 while at liberty under bail.

[fol. 127] The Director's return to the order to show cause and which was prior to the remand, contained allegations: That Frank Carlson was not being illegally restrained of his liberty; he was in custody pursuant to a warrant of arrest dated October 31, 1950, issued under authority of the

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[3] Compare Title 8 U.S.C.A. § 137, as amended by the Act of September 23, 1950, c. 1024, Title I, § 22, 64 Stat. .....; with Title 8 U.S.C.A. § 137, as amended by the Act of June 28, 1940, c. 439, Title II, § 23, 54 Stat. 673.

Attorney General, directing that petitioner be taken into custody and granted a hearing to enable him to show cause why he should not be deported in conformity with law; that there was reasonable cause to believe that if he were enlarged on bail he would engage in activities prejudicial to the interest and safety of the United States.

After the remand the court issued the writ, and in the return thereto it is alleged in substance: That Carlson is restrained of his liberty in respondent's custody under proper and lawful authority; that he is a native and national of Poland, born at Kosow, Galicia, Poland, on or about March 6, 1913 that a warrant for the said petitioner's arrest was issued on October 28, 1947, charging that he was subject to deportation under the Act of October 16, 1918, as amended (8 U.S.C. § 137); that he was taken into custody on the warrant of November 3, 1947, and on November 5, 1947, was released on furnishing bail; that hearings were conducted; that the record was returned for hearings de novo because of *Sung* v. *McGrath*, 339 U.S. 33 (1950); that on September 26, 1950, the Commissioner in charge of Immigration in Washington, D. C., under the Attorney General, requested a report on all aliens in the Los Angeles district who were *currently* active members of the *Communist Party;* that on October 6, 1950, the Director submitted the report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, which report recited facts tending to establish that Carlson was one of the eleven currently active members of the Communist Party; that on October 21, 1950, instructions were received by the Director from the Attorney General directing the immediate apprehension and detention of Carlson; this direction was conformed to on the 21st of October, 1950; that on October 27, 1950, the radiogram set out in the margin was received by the Direc- [fol. 128] tor in Los Angeles from the Attorney General[4];

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[4] Radiogram: "For your information and that of United States attorneys and aliens and their attorneys the instruction to you of October twenty first to take into custody and

that a new warrant of arrest was issued October 31, 1950, superseding the warrant of 1947 [hereinbefore mentioned]; that attached to the return is Exhibit "B" consisting of an amended affidavit of the Director. We hereinafter detail the attached exhibit and affidavit. It is alleged that the Attorney General has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program of the Communist Party, the central purpose of which is to subvert the existing government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship committed to the destruction of individual liberty and private property; and that, moreover, said facts cause the said Acting Commissioner (Attorney General) to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

The Director's affidavit referred to states in substance: That he is custodian of the records of the United States [fol. 129] Immigration and Naturalization Service in Los Angeles district; that with respect to Frank Carlson, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been and still is a member of the Communist Party of the United States and has

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detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of nineteen fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued detention might impose stop as you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority stop also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by Section nine zero point one of Title eight CFR paren twelve fr five zero seven two July thirty one nineteen forty seven paren under section thirty seven of the Alien Registration Act of nineteen forty comma eight USC four five eight."

and is actively participating in the execution of its program for a world-wide revolution and the establishment of a Communist totalitarian dictatorship in the countries throughout the world; more specifically, that said petitioner has admitted membership in the Young Communist League, a Subsidiary, Branch, and Affiliate of the Communist Party of the United States; that petitioner is an admitted member of the Communist Party of the United States of America having joined it about 1932; that petitioner was editor of the "Young Worker", official organ of the Young Communist League of the United States of America; that he was a member of the National Executive Committee of the Young Communist League; that he was the secretary and president of the Young Communist League of California; that in 1945 he admitted membership in the Communist Party and stated that he believed in its program and that he had been an active member thereof for fifteen years; that during the latter part of 1946 until about the summer of 1947 the petitioner was state secretary of the Communist Party of the United States for the State of Wisconsin; that in 1949 petitioner caused to be published in "Our Times" (a weekend supplement of the "Daily People's World", West Coast organ of the Communist Party) an article entitled "I Demand Citizenship" in which he stated that he was a member of the Communist Party; that in September, 1949, he headed the Marxist Institute in Los Angeles; that on September 4, 1950, he was present at the meeting of the Civil Rights Congress in Los Angeles, California, (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that in writing for the "Daily People's World" (Official West Coast organ of the Communist Party of the United States of America), November 10, 1950, issue, he stated among other things in an article entitled "They Can't Deport You", " I told them I am a Communist;" said issue of the "Daily People's World" is attached to, and incorporated as part of, this exhibit; that said petitioner is presently the Los Angeles County Educational Director for the Communist Party of the [fol. 130] United States; that in connection with his deportation hearing at Los Angeles, California, on September 7, 1950, the petitioner refused to answer questions concerning his membership in the Communist Party on the grounds of

self-incrimination; that the Service records show with respect to petitioner's hearings under Service Warrant of arrest that the case was first set for hearing on November 21, 1950, and continued to November 28, 1950, on motion of petitioner's counsel. On the latter date, the case was again continued on motion of petitioner's counsel to January 1951. On the latter date on the motion of petitioner's counsel, it was again continued to February 16, 1951.

Attached to and made a part of the amended Exhibit "B" are two photostat sheets of "Our Times" dated November 10, 1950. The first sheet consists of an article most highly praising Communist China with editorial comment. The next sheet is the article allegedly written by Appellant Carlson. The first sheet shows the nature of the publication. The second sheet mirrors Appellant Carlson as strongly Comm istic. Carlson's alleged Communistic activities, as set out in the return and affidavit, are not denied.[5]

The Director argues that his return, as supplemented by the affidavit, is sufficient under our *Carlson* opinion (186 F. 2d 183 (1950)) to show that discretion was used in denying bail to Carlson, and that the determination to deny him bail was reasonable and not arbitrary or capricious.

The appellant argues that there is no such showing under the theory of the *Carlson* opinion. In approaching this question we are reminded of the fact that appellant bears heavily in his argument upon our likening the required showing of fact upon which the discretion of the Attorney General shall be based, to the showing required in a preliminary examination before a magistrate in an arrest for crime. He argues that, so measured, the showing by the Attorney General is insufficient. The analogy is not perfect and was used merely to illustrate the principle that American jurisprudence abhors the imprisonment of any human being without a public justification therefor.

[fol. 131] No person who entertains opposition to established government has a right to attempt or to incite its change or destruction by force and violence, any more than he has the right to take the law into his own hands under

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[5] The general comment from this point to the subtitle "The Appeal of Stevenson" applies to each appellant.

any other grievance. We have in our scheme of government made change relatively easy, once the majority wants it, and any person who takes what is sometimes expressed as *Direct action* (outside of law) is an enemy of the state and of every person in it.

The basic principles of our government that the individual shall be free to speak, free to publish, free to worship, free to be personally unrestrained, are not absolute. It would be an anomalistic use of the term "government" to apply it to a state organization which is without the power to resist its own violent destruction.

It is said by appellant that there is no proof here as to the intention of the Communist Party of the United States or of Communists to maim or destroy our government by force and violence, and cites the *Schneiderman* case (320 U.S. 118 (1943)). The *Schneiderman* case was of yesterday. As Justice Hughes one time so expressively said, "Courts do not function in a vacuum." The courts today are acquainted with current history and, too, with the legislative findings set out in the Internal Security Act of 1950, from which we quoted liberally in the first *Carlson* opinion.

The existence as of today of a world-wide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence is perfectly clear and incontrovertible.

The Attorney General is charged with the gravest responsibility. He is by law ordered to deport aliens who are or have been members of the Communist Party since their entry. The judiciary has no right to interfere with that duty, though it must be alert to strike down all arbitrary action.

The district court in the case of Carlson was shown that the Attorney General did submit the evidence furnished him to his considered discretion. The evidence included the professed presently existing status of a "Red" as to Carlson specifically; evidence of leadership in Communistic [fol. 132] organizations; evidence of admitted membership in the Communist Party as late as 1945; evidence that appellant wrote and had published in a recent publication an article entitled "They Can't Deport You". This article most strongly points to Appellant Carlson as a present militant Communist. And we may add that the title page

to the publication contains an article which treats Communism as a doctrine of liberation, and in the most nauseating manner treats the United Nations' condemned aggressor, Communist China, which is now engaged in killing Americans and other Nationals, as an enlightened advance of a people's civilization. There is a marked difference between the showing made at the first hearing before the district court, and the showing made after the remand.

THE APPEAL OF STEVENSON

The proceedings as to Appellant Stevenson follow the pattern detailed hereinbefore as to Appellant Carlson. We take the personal history of this appellant as set up in her petition for issuance of the writ, from our former opinion and order reversing and remanding as of December 20, 1950 (186 F. 2d 196), as follows:

"Petitioner Stevenson was born in England in 1919. At the age of 12 years she was taken to Canada with her family. She entered the United States in 1923 and since has resided in Los Angeles, California. With her mother she visited Canada in 1928 for a few hours and later in the same year she went to Mexico for a few hours where she was married to a United States citizen. In 1929 she made inquiry of the Immigration and Naturalization Service as to her applying for citizenship but her legal entrance into this country was questioned."

The return filed in the earlier proceedings, prior to the remand, contained allegations in substance as follows: That petitioner Stevenson was not being illegally restrained of her liberty; that she was in custody pursuant to warrant of arrest dated October 31, 1950, issued under authority of the Attorney General, directing that the petitioner be taken into custody and granted a hearing to enable her to show cause why she should not be deported in conformity with law; that there was reasonable cause to believe that if said petitioner were enlarged on bail she would engage in activ- [fol. 133] ities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

The return filed by the Director after the remand alleged in substance: That petitioner Stevenson is not being illegally restrained by respondent of her liberty; that she is

a native and subject of Great Britain, born at London, England, on or about August 26, 1907; that a warrant for said petitioner's arrest was issued by authority of the Attorney General on July 8, 1949, charging that she was subject to deportation under the Act of October 16, 1918, as amended (8 U.S.C. §137); that said petitioner was taken into custody on the aforesaid warrant of arrest on July 26, 1949, and on the same date was released from custody on a delivery bond in the sum of $2,000; that, after a hearing on said warrant of arrest, in order to give the petitioner an opportunity to show cause why she should not be deported, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung* v. *McGrath*, 339 U.S. 33; that on September 26, 1950, the Attorney General requested the Director to submit a report covering all aliens in the Los Angeles district who were currently active members of the Communist Party and who were under deportation proceedings on charges under the Act of October 16, 1918, as amended (8 U.S.C. §137); that on October 6, 1950, the District Director of Immigration and Naturalization, Los Angeles, California, submitted to the Attorney General a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all of whom were the subjects of pending deportation proceedings under the Act of October 16, 1918, as amended (8 U.S.C. §137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit which is attached as a part of the return; that on October 21, 1950, instructions were received by the Director from the Attorney General directing the immediate [fol. 134] apprehension and detention of "* * * all active Communists under proceedings in your district unless detention would result in severe hardship because of individual's physical condition or family situation. * * *"; that pursuant to the aforesaid instructions the petitioner was taken into custody on October 24, 1950, on the afore-

said warrant of arrest issued July 8, 1949; that on October 27, 1950, the radiogram quoted in footnote (4), supra, was received by the Director in Los Angeles from the Attorney General; that on October 31, 1950, while said petitioner continued in custody under the warrant of arrest issued on July 8, 1949, a new warrant of arrest was issued by authority of the Attorney General charging that she was subject to deportation under the Act of October 16, 1918 (8 U.S.C. §137), as amended by the Internal Security Act of 1950, and served upon petitioner, which said warrant of arrest of October 31, 1950, superseded the said warrant of arrest issued on July 8, 1949; a copy of which warrant of arrest of October 31, 1950, is attached as a part of the return; that pursuant to outstanding instructions from the Attorney General the case of petitioner has been given first priority in expediting hearing, to the end that said case may be disposed of as speedily as possible, but delay has been encountered from counsel for petitioner; that the Attorney General has exercised his discretion to take said petitioner into custody and to continue her in custody without bail pending final determination of her deportability, and in exercising said discretion to detain said petitioner without bail the Attorney General has carefully considered facts which in his judgment establish that the petitioner is a currently active member of the Communist Party engaged in the execution of the Program of the Communist Party, the central purpose of which is to subvert the existing government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship committed to the destruction of individual liberty and private property; and that, moreover, said facts cause the Attorney General to believe that if said petitioner were enlarged on bail she would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States—which findings the Attorney General has communicated to the Director.

[fol. 135] The affidavit of the Director contains allegations in substance as follows: That he is the Director and as such is custodian of the records of the United States Immigration and Naturalization Service in said district; that with respect to petitioner Stevenson the Service is in

possession of evidence showing that she has been a member of the Communist Party of the United States and has actively participated in its program; more specifically that the petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; that she was the Secretary of a Communist Party Unit in 1938; that she participated in the "Lenin" celebration in Los Angeles; that she admitted in 1948 attending Communist Party meetings and also admitted membership in the American League for Peace and Democracy (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); and that in 1950 at a deportation hearing she refused to answer questions concerning her membership in the Communist Party on the ground of self-incrimination; that the Service records show with respect to petitioner's hearings under Service Warrant of Arrest that there have been undue delays in hearings thereunder, that the first case was scheduled for hearing on November 30, 1950, but was taken off calendar at request of petitioner's counsel; that it was next set for hearing on December 6, 1950 and continued on motion of petitioner's counsel; that it was again set for hearing on December 11, 1950, and again continued to December 14, 1950, on motion of petitioner's counsel; that on the latter date the case was again continued on motion of petitioner's counsel to December 15, 1950; and that on the last mentioned date it was again continued on motion of petitioner's counsel and set for hearing January 5, 1951.

The Appeal of Hyun

The proceedings as to Appellant Hyun follow the pattern detailed hereinbefore as to Appellant Carlson. We take the personal history of this appellant as set up in his petition for issuance of the writ, from our former opinion and order reversing and remanding as of December 20, 1950 (186 F. 2d 190), as follows:

[fol. 136] "Petitioner Hyun was born in Seoul, Korea; is 33 years of age; was taken to Hawaii at an early age and resided there until December, 1947. His schooling resulted

in a bachelor of science degree. In school he appears to have been a leader in social and religious activities. Although disqualified for military service during the late war because of his status as an alien, he became Captain of Reserve Officers Training Corps at the University of Hawaii. He has applied for citizenship; is married and has two minor sons. He has resided in Los Angeles, California, since December, 1947, and has engaged in a useful occupation. Petitioner's petition is replete with a detailed account of his life."

The Director's return to the writ issued after remand is much like that recited in the *Carlson* case. It definitely alleges that Appellant Hyun is currently active as a Communist. To the return is attached an affidavit by the Director and made a part thereof. We quote from the affidavit: "* * * with respect to DAVID HYUN, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party and has actively participated in its program; more specifically, that said petitioner was a member of the Communist Party in the Territory of Hawaii and was instrumental in reactivating the Communist Party in Hawaii in 1945; that he led and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the Communist Party during the years 1946 and 1947; that he advocated redistribution of wealth and government ownership of industry, such as exists in Russia, and that these reforms would take place following the revolution in the United States; that said petitioner was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that he was Educational Director of the Westlake Section of the Communist Party in Los Angeles, California, in 1949."

THE APPEAL OF CARLISLE

The proceedings as to Appellant Carlisle follow the pattern detailed hereinbefore as to Appellant Carlson. We [fol. 137] take the personal history of this appellant as set up in his petition for issuance of the writ, from our former

opinion and order reversing and remanding as of December 20, 1950 (186 F. 2d 190), as follows:

"Petitioner Carlisle was born in England in 1897 and has resided in Los Angeles, California, for the past 15 years."

It was alleged in the return filed in the earlier proceedings, prior to the remand, in substance as follows: That Appellant Carlisle was not being illegally restrained of his liberty; that said petitioner is in the Director's custody pursuant to a warrant of arrest dated October 31, 1950, issued by authority of the Attorney General, directing that petitioner be taken into custody and granted a hearing to enable him to show cause why he should not be deported in conformity with law; that there was reasonable cause to believe that if said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States.

The return filed by the Director after the remand contained allegations in substance as follows: Appellant is not being illegally restrained by respondent of his liberty; that he is a native and subject of Great Britain, born at London, England, on or about September 23, 1897; that a warrant for said petitioner's arrest was issued by authority of the Attorney General on June 13, 1950, charging that he was subject to deportation under the Act of October 16, 1918, as amended (8 U.S.C. §137); that he was taken into custody on the aforesaid warrant of arrest on June 16, 1950, and on June 19, 1950, was released from custody on a delivery bond in the sum of $5,000; that, after a hearing on said warrant of arrest to give said petitioner an opportunity to show cause why he should not be deported, a hearing de novo under the Administrative Procedure Act was ordered as a result of the decision of the Supreme Court in the case of *Sung* v. *McGrath*, 339 U.S. 33; that on September 26, 1950, the Acting Commissioner of Immigration and Naturalization under the Attorney General at Washington, D. C., requested the Director at Los Angeles, California, to submit a report covering all aliens in the Los Angeles district who were currently active members of the Communist Party and who were under deportation [fol. 138] proceedings on charges under the Act of Octo-

ber 16, 1918, as amended (8 U.S.C. §137); that on October 6, 1950, the Director submitted a report containing summaries of facts as reflected in the confidential and official records of the Government at Los Angeles in the cases of eleven aliens indicated to be currently active members of the Communist Party, and in the cases of eight aliens indicated to be past members of the Communist Party, all of whom were the subjects of pending deportation proceedings under the Act of October 16, 1918, as amended (8 U.S.C. §137), which report recited facts tending to establish that the aforesaid petitioner was one of the said eleven currently active members of the Communist Party, some of which facts are recited in respondent's affidavit attached as a part of the return; that on October 21, 1950, instructions were received by the Director from the Attorney General directing the immediate apprehension and detention of Carlisle; that pursuant to the aforesaid instructions he was taken into custody on October 21, 1950, on the aforesaid warrant of arrest issued on June 13, 1950; that on October 27, 1950, the radiogram set out in footnote (4), supra, was received by the Director in Los Angeles from the Attorney General; that on October 31, 1950, while said petitioner continued in custody under the warrant of arrest issued on June 13, 1950, a new warrant of arrest was issued charging that appellant was subject to deportation under the Act of October 16, 1918 (8 U.S.C. §137), as amended by the Internal Security Act of 1950, and served upon said petitioner, which said warrant superseded the June 13, 1950, warrant; that pursuant to the Attorney General's instructions the case of petitioner has been given first priority to the end that it may be speedily heard; that the Attorney General has exercised his discretion to continue appellant in custody without bail pending final determination of his deportability, and in exercising said discretion to detain him without bail the Attorney General has carefully considered facts which in his judgment establish that the said petitioner is a currently active member of the Communist Party engaged in the execution of the program of the Communist Party, the central purpose of which is to subvert the existing government of the United States indirectly by espionage and sabotage and directly by force and violence and to substitute a totalitarian dictatorship

committed to the destruction of individual liberty and pri-
[fol. 139] vate property; and that said facts cause the Director and the Attorney General to believe that if said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States —which findings the said Attorney General has communicated to the Director.

The affidavit of the Director contains allegations in substance as follows: That he is the said Director and as such is custodian of the records of the United States Immigration and Naturalization Service in said district; that with respect to petitioner Harry Carlisle, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party of the United States and has actively participated in its program; more specifically, that in 1932 petitioner stated that he was in favor of the overthrow of the government of the United States and would go to any means to attain that end; that petitioner was a speaker at closed meetings of Communist Party functionaries in 1933; that in 1935 said petitioner was editor of the "Western Worker" (the then official Western organ of the Communist Party of the United States of America, Section of the Communist International); that in 1937 said petitioner was a member of the League of American Writers (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that in 1949 said petitioner was reported in the Press as speaker on Communist Party topics and activities; that in 1949 said petitioner was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F.R. 315, No. 231); that in August, 1950, said petitioner was a speaker at a meeting of the Civil Rights Congress in Los Angeles, California, (an organization designated by the Attorney General as Communist, F.R. 315, No. 231); that at hearings held in connection with deportation proceedings, petitioner refused to answer questions regarding his membership in the Communist Party on the ground of self-incrimination; that the Service Records show with respect to petitioner's hearings under Service warrant of arrest that the case was first

set for hearing on November 22, 1950, and upon motion of petitioner's counsel was continued to November 28, 1950; that on that date the case was again continued to December [fol. 140] 13, 1950, on motion of petitioner's counsel; and that on the latter date it was again continued on motion of petitioner's counsel.

We are of the opinion and hold that the showing made by the Director's affidavits and returns, many of the salient features of which are undenied, constitutes evidence in support of the district court's holding that a sufficient showing had been made in support of the Director's refusal to enlarge any of the appellants on bail, and that the Attorney General did not abuse his discretion in his order to the Director denying bail to any of them.

We append some citations of authorities by way of a case note. They are by no means complete.[6] The authorities do,

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[6] *Ex parte Perkov*, D.C.Cal., 45 F.Supp. 864 (1942), (application of Eighth Amendment to deportation proceedings); *Principe* v. *Ault*, D.C.Ohio, 62 F.Supp. 279 (1945), (power of court to admit to bail in deportation cases); *United States ex rel. Zapp et al.* v. *District Director of Immigration and Naturalization*, 2 Cir., 120 F.2d 762 (1941), (expulsion of aliens is a legislative function); *United States ex rel. Carapa* v. *Curran*, 2 Cir., 297 F. 946 (1924), (bail in deportation proceedings is a matter of statute); *American Communications Association* v. *Douds*, 339 U.S. 382 (1950), (findings of Congress may permissibly be used to assist in the interpretation and application of legislation); *United States ex rel. Potash* v. *District Director*, 2 Cir., 169 F.2d 747 (1948), (factors to consider in deciding whether bail shall be allowed); *United States ex rel. Pirinsky* v. *Shaughnessy*, 2 Cir., 177 F.2d 708 (1949), (amount of bail); *In re Lum Poy*, C.C.D. Mont., 128 F. 974 (1904), (Chinese held for deportation under exclusion Act bailable); *Chin Wah* v. *Colwell*, 9 Cir., 187 F. 592 (1911), (order denying bail in Chinese deportation proceedings affirmed); *United States ex rel. Bauer* v. *McGrath*, D.C.N.Y., 87 F.Supp. 698 (1949), (bail *after* alien held deportable); *United States* v. *Fah Chung*, D.C.S.D. Georgia, 132 F. 109 (1904), (Chinese not entitled to bail as a matter of right *after* final order of deportation); *Williamson* v. *United*

we think, clearly indicate that an important area of bail [fol. 141] and habeas corpus law is viewed by the various federal courts in various lights. An alien presently in the United States may be intercepted and excluded if the Congress wills it. It has willed it with certain conditions which must be concluded after a hearing. The Attorney General has the discretion to grant or deny bail after the alien has been arrested and prior to the required hearing. We reason that such discretion carries with it the usual requirements

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States, 2 Cir., 184 F.2d 280 (1950), (Communists convicted of conspiring to advocate and teach the violent overthrow of the United States government held bailable pending appeal);

In *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), the court stated at page 543:

"'Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude an alien.'"

At page 544 the court states: "In the particular circumstances of the instant case the Attorney General, exercising the discretion entrusted to him by Congress and the President, concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States. He denied her a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security."

At page 548, in a footnote to the dissenting opinion by Justice Frankfurter, it is stated:

"The Attorney General is to act on information that satisfies him; not only is there no opportunity for a hearing, but the Attorney General can lock in his own bosom the evidence that does satisfy him * * *." Justice Jackson, with Justice Black, also dissented.

that it shall not be exercised abitrarily or capriciously, and that the courts through the exercise of the writ of habeas corpus have the power to test whether or not the decision has a reasonable basis in relevant facts. We are fully cognizant of the fact that a large part of the allegations in the Director's return and the statements in his affidavits would not constitute evidence in a criminal case nor at the deportation hearings. To prove such allegations and statements foundations, of course, would have to be laid. However, the issue here, as we have tried to make clear, is not the guilt or innocence of the appellant-petitioners, nor must it be taken from what we have said that the district court has the power to substitute its discretion for that of the Attorney General. The issue before the district court was whether, after viewing the whole case as to each appellant-petitioner, it could be found that the Attorney General abused his discretion in denying bail.

[fol. 142] In the cases in suit the district court weighed the evidence in the light of the times and, we think, came to the correct and legal conclusions. As to each appellant the judgment is affirmed.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 13, 1951. Paul P. O'Brien, Clerk.

[fol. 143] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12742.

FRANK CARLSON, etc., *Appellant*,

vs.

HERMAN R. LANDON, etc., *Appellee*.

JUDGMENT—March 13, 1951

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the South-

ern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 144] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12743.

MIRIAM CHRISTINE STEVENSON, etc., *Appellant*,

vs.

HERMAN R. LANDON, etc., *Appellee*.

JUDGMENT—March 13, 1951

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 145] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12744.

DAVID HYUN, *Appellant*,

vs.

HERMAN R. LANDON, etc., *Appellee*.

JUDGMENT—March 13, 1951

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 146] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12745.

HARRY CARLISLE, etc., *Appellant*,

vs.

HERMAN R. LANDON, etc., *Appellee*.

JUDGMENT—March 13, 1951

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the South-

ern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[f. 147] Clerks' Certificate to foregoing transcript omitted in printing.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER,

vs.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 22, 1951.

CERTIORARI GRANTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER,

VS.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In United States District Court for the Eastern District of Michigan, Southern Division

No. 9883.

JOHN ZYDOK, PETITIONER

v.

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS AND ORDER FOR ISSUANCE THEREOF.—Filed October 24, 1950

To The Court:

The petition of Alan N. Brown, attorney for John Zydok, of the City of Detroit, Wayne County, Michigan, respectfully shows:

1. That John Zydok is now imprisoned by the United States Immigration & Naturalization Service in the Wayne County Jail in the said City of Detroit.

2. That according to the best of your petitioner's knowledge and belief, such confinement is not for any lawful cause or reason and not by virtue of any warrant, order or Constitutional process whatsoever and not for any crime or offense against the laws of the U. S. A., State of Michigan or City of Detroit or against or upon any of its citizens or inhabitants thereof.

2 3. Wherefore your petitioner prays that a writ of Habeas Corpus may be issued to inquire into the cause of the imprisonment and detention of the said person and that the said named person may be relieved therefrom.

ALAN N. BROWN,
Petitioner and Attorney for John Zydok, prisoner,
963 Penobscot Building, Detroit 26, Michigan.

Upon filing the within petition, let a Writ of Habeas Corpus issue as prayed for therein.

(Signed) THOMAS P. THORNTON,
Judge of the U. S. District Court,
Eastern District of Michigan, Southern Division.

Duly sworn to by Alan N. Brown. Jurat omitted in printing.

3 In United States District Court

WRIT OF HABEAS CORPUS—Filed October 24, 1950

In the Name of the People of the United States of America.

To United States Immigration & Naturalization Service (Detroit office), John Doe and Richard Roe, we command that you have the body of John Zydok by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said John Zydok shall be called or charged, before the undersigned, Judge of the U. S. District Court, at the Federal Building, Detroit, Michigan on the 24th day of October, A. D. 1950 at 2 p. m. o'clock, to do and receive what shall then and there be considered concerning the said John Zydok and have you then there this writ.

Witness, Hon. Thomas P. Thornton and the seal of the U. S. District Court, Eastern District of Michigan, Southern Div. this 24th day of October, A. D. 1950.

GEORGE M. READ,
Clerk of the U. S. District Court,
Eastern District of Michigan, Southern Division.
(S.) JOHN J. GINTHER,
Dep. Clk.

4 In United States District Court

RETURN OF SERVICE OF WRIT OF HABEAS CORPUS—Filed October 24, 1950

UNITED STATES OF AMERICA,
STATE OF MICHIGAN,
County of Wayne, ss:

Mitchell Schnaar, of the City of Detroit, Wayne County, Michigan, being first duly sworn, deposes and says that he is an attorney associated with Alan N. Brown, attorney for the above named petitioner, and that on the 24th day of October, 1950, he served a true copy of the Writ of Habeas Corpus issued in the above entitled cause on the 24th day of October, 1950 by the Hon. Thomas P. Thornton, United States District Judge, on the above named defendant, by personally handing same to Harry Kobel, District Adjudications Officer of said defendant and duly authorized agent to accept service of said Writ of Habeas Corpus.

Further deponent saith not.

(S.) MITCHELL SCHNAAR,
Deponent.

Subscribed and sworn to before me this 24th day of October, A. D. 1950.

(S.) ROBERTA MYERS,
Notary Public, Wayne County, Michigan.

My Commission expires July 4, 1954.

5 In United States District Court

ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS—Filed October 27, 1950

Now comes James W. Butterfield, District Director of the Immigration and Naturalization Service, the respondent herein, by Edward T. Kane, United States Attorney and Joseph C. Murphy, Assistant United States Attorney, and Harry Kobel, Assistant District Adjudications Officer, Immigration and Naturalization Service, and files his answer and return to a writ of habeas corpus in this cause stating as follows:

1. Answering the allegations contained in paragraph 1 of the petition filed in this cause the respondent admits the same.

2. Answering the allegations contained in paragraph 2 of the petition filed in this cause your respondent denies the same and states:

A. That the petitioner John Zydok is an alien.

B. That pursuant to a warrant dated June 30, 1949, issued by W. F. Kelly, Assistant Commissioner, Enforcement Division of the Immigration and Naturalization Service, a copy of which is attached and made a part hereof, and by direction of the Acting Commissioner of the Immigration and Naturalization Service, the petitioner, John Zydok, on October 23, 1950 was arrested and taken into custody.

C. That there is presently pending before the Immigration and Naturalization Service at Detroit, Michigan a proceeding under the aforesaid warrant to determine the deportability of this petitioner, John Zydok, and that a hearing was held beginning September 19, 1950 and continued without date at the request of this petitioner.

C. That under the authority contained in Section 20 of the Immigration Act of 1917, as amended by Section 23
6 of the Subversive Activities Control Act of 1950, the Attorney General, acting through his duly authorized representatives directed that this petitioner, John Zydok, be continued in custody.

Wherefore, your respondent respectfully moves that the writ of habeas corpus issued in this cause be discharged and that the petitioner remain in the custody of this respondent.

EDWARD T. KANE,
United States Attorney.
JOSEPH C. MURPHY,
Assistant U. S. Attorney.
HARRY KOBEL,
Assistant District Adjudications Officer,
Immigration and Naturalization Service.

WARRANT

For Arrest of Alien

COPY COPY

United States of America
Department of Justice
Washington

0800-65204
A-5098547

To District Director of Immigration and Naturalization, Detroit, Michigan or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Iwan Zydok or John Zydok alias John Son who entered this country

at New York, New York ex SS "Carpathia" on the 23rd day of June, 1913 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law;
7 and for the following reasons, to wit: The Act of October 16, 1918, as amended, in that he was, after entry a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that advises, advocates, or teaches the overthrow, by force or violence of the Government of the United States; and the Act of October 16, 1918, as amended, in that he was, after entry a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays any written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1949." Authority has been granted for release under bond in the sum of $2,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 30th day of June, 1949.

(S.) W. F. KELLY,
Assistant Commissioner,
Enforcement Division.

8 In United States District Court

PROOF OF SERVICE OF PETITION TO ATTORNEY GENERAL TO GRANT BAIL—Filed October 27, 1950

UNITED STATES OF AMERICA,
STATE OF MICHIGAN,
County of Wayne, ss:

Alan N. Brown, of the City of Detroit, County of Wayne, State of Michigan, being first duly sworn, deposes and says that he is the attorney for John Zydok, the above named alien who was arrested on Monday, October 23, 1950 by agents of the United States Immigration and Naturalization Service in Detroit, Michigan; and that said alien petitioner is being so restrained and detained on the sole claim and sole authority of instructions

from the Attorney General in the enactment of September 23, 1950 of the Internal Security Act of 1950, Section 23 (a), and that said Act states, in part, that such alien may in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole.

Deponent further says that, pursuant to the foregoing provision, on the 25th day of October, 1950, as attorney for said John Zydok, he petitioned J. Howard McGrath, Attorney General of the United States, Washington, D. C., to grant reasonable bail under his discretionary power as provided for in section 23 (a) Internal Security Act 1950, as above stated, to the said petitioner, John Zydok, by Western Union night letter, a true copy of which is hereto attached and made part hereof.

Deponent further says that on the 27th day of October, 1950 he mailed a true copy of said petition to Edward T. Kane, United States Attorney, by enclosing same in a sealed envelope, sufficiently-stamped, and addressed to his offices, to-wit: Federal Building, Detroit 31, Michigan, and mailing same in the U. S. mail chute on the ninth floor of the Penobscot Building, Detroit 26, Michigan.

9

Further deponent saith not.

(S.) ALAN N. BROWN,
Deponent.

Subscribed and sworn to before me this 27th day of October, A. D. 1950.

(S.) ROBERTA MYERS,
Notary Public, Wayne County, Michigan.

My Commission expires July 4, 1954.

WESTERN UNION

(True Copy)

October 25, 1950.

J. HOWARD MCGRATH,
Attorney General of the United States,
Washington, D. C.

HONORABLE SIR:

Eighth Amendment of US Constitution prohibits excessive bail Stop Section 23a Internal Security Act 1950 gives you discretion to allow or deny bail pending deportation proceedings Stop Believe discretion denying bail conflicts with eighth amendment Stop Further believe this section invasion of right of judicial branch of gov-

ernment as defined in US Constitution Stop John Zydok Detroit arrested October 23 for deportation habeas corpus proceedings now pending in US District Court Detroit before Thomas Thornton District Judge adjourned to October 30 for hearing Stop Zydok in US continuously since 1913 no criminal record has three children two served in last war owns home reported faithfully before arrest in pending deportation case Stop Respectfully petition you to grant reasonable bail under discretionary power of section 23a Internal Security Act 1950.

Respectfully yours,

ALAN N. BROWN,
Attorney for John Zydok,
963 Penobscot Building,
Detroit 26, Michigan.

10 In United States District Court

TRAVERSE—Filed November 3, 1950

The relator, for his traverse to the return herein, by his attorney, Alan N. Brown, alleges:

1. The relator was arrested and is being held without bail in custody, without any legal process whatsoever; the original warrant of arrest has lost its force as an arresting instrument.

2. The re-arrest of the relator is not within the terms of section 23(a) of the Internal Security Act of 1950.

3. Section 23(a) of the Internal Security Act of 1950, does not authorize the detention of the relator without bail. In many district courts in the United States, it has been held that an alien cannot be held without bail because of the Internal Security Act of 1950.

4. The re-arrest of the relator is an abuse of discretion by the Attorney General in violation of the Fifth and Eighth Amendments to the Federal Constitution.

5. The re-arrest of the relator is not for the ordinary purposes of bail, but for the improper and indirect purpose of compelling him to apply for travel documents.

6. The re-arrest of the relator and his detention without bail, is a violation of the First Amendment to the Federal Constitution, and serves to discriminate against him because of his views and associations.

7. Relator repeats and re-alleges and makes a part hereof with the same force and effect as if herein specifically set forth, each and every allegation of paragraph 1 and 2 of the petition, heretofore verified on the 24th day of October, 1950 by Alan N. Brown, as attorney in said cause, for John Zydok.

8. Relator denies each and every allegation in paragraph 2, sub-paragraph B. He admits that there is presently pending
11 before the Immigration and Naturalization Service in Detroit a proceeding under the aforesaid warrant to determine the deportability of your relator, and admits that a hearing was held beginning September 19, 1950, but denies that it was continued solely at the request of your relator, and in answer thereto says that the proceeding had not been concluded and a date for the continuation of the hearing was to be set when it could be determined when the presiding inspector would be available in Detroit to conclude it.

9. Your relator denies each and every allegation in paragraph 2, sub-paragraph D (incorrectly stated in the Return as sub-paragraph C).

Wherefore, relator respectfully requests that the writ of habeas corpus be sustained and that he be released from custody on the bail heretofore posted by him in the deportation proceedings still pending against him.

(S.) ALAN N. BROWN,
Attorney for Relator,
963 Penobscot Building,
Detroit 26, Michigan.

Duly sworn to by Alan N. Brown. Jurat omitted in printing.

12 In United States District Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 10, 1950

1. The petitioner, John Zydok, on October 24, 1950, by his attorney, filed a petition for a writ of habeas corpus wherein he alleges that his confinement

> "is not for any lawful cause or reason and not by virtue of any warrant, order or Constitutional process whatsoever and not for any crime or offense against the laws of the U. S. A."

2. The hearing on the petition was set for 2:00 o'clock on the same day at which time the petitioner was produced in court and was orally informed by Mr. Joseph C. Murphy, Chief Assistant United States District Attorney for the Eastern District of Michigan, as to the cause of his detention by the respondent, and at which time the Government requested an adjournment of three days in order to make a formal return, which request was granted by the Court.

3. The answer and return to the petition by the respondent alleges that the petitioner is an alien and that pursuant to a warrant dated June 30, 1949, issued by W. F. Kelly, Assistant Commissioner, En-

forcement Division of the Immigration and Naturalization Service, and by direction of the Acting Commissioner of the Immigration and Naturalization Service, the petitioner, John Zydok, on October 23, 1950, was arrested and taken into custody; and that there is presently pending before the Immigration and Naturalization Service at Detroit, Michigan, a proceeding under the aforesaid warrant to determine the deportability of the petitioner, John Zydok, and that a hearing was held beginning September 19, 1950, and continued without date at the request of this petitioner, and that under the authority contained in Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Subversive Activities Control Act of 1950, the Attorney General, acting through his duly authorized representatives, directed that this petitioner, John Zydok, be continued in custody.

13 4. Appended to and made a part of the answer returned by the respondent was the afterdescribed warrant:

WARRANT
FOR ARREST OF ALIEN

"Form I-200
(Rev. 5-1-45)
U. S. Department of Justice
Immigration and
Naturalization Service

UNITED STATES OF AMERICA
Department of Justice
Washington

0800-65204
No. A-5098547

To District Director of Immigration and Naturalization, Detroit, Michigan or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Iwan Zydok or John Zydok alias John Son who entered this country at New York, New York ex SS 'Carpathia' on the 23rd day of June, 1913 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: The Act of October 16, 1918, as amended, in that he was, after entry a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that advises, advocates, or teaches the overthrow, by force or violence of the Government of the United States; and the Act of October 16, 1918, as amended, in

that he was, after entry a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays any written or printed matter advising, advocating or teaching the overthrow, by force or violence,
14 of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation 'Salaries and Expenses, Immigration and Naturalization Service, 1949.' Authority has been granted for release under bond in the sum of $2,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 30th day of June, 1949.

(S.) W. F. Kelly,
Assistant Commissioner
Enforcement Division."

5. The traverse filed by the petitioner on November 3, 1950, alleges substantially as follows:

"1. The relator was arrested and is being held without bail in custody, without any legal process whatever; the original warrant of arrest has lost its force as an arresting instrument.'

"2. The re-arrest of the relator is not within the terms of section 23(a) of the Internal Security Act of 1950."

"3. Section 23(a) of the Internal Security Act of 1950, does not authorize the detention of the relator without bail. In many district courts in the United States, it has been held that an alien cannot be held without bail because of the Internal Security Act of 1950."

"4. The re-arrest of the relator is an abuse of discretion by the Attorney General in violation of the Fifth and Eighth Amendments to the Federal Constitution."

15 "5. The re-arrest of the relator is not for the ordinary purposes of bail, but for the improper and indirect purpose of compelling him to apply for travel documents."

"6. The re-arrest of the relator and his detention without bail, is a violation of the First Amendment to the Federal Constitution, and serves to discriminate against him because of his views and associations."

6. That the petitioner is an alien who has resided in the United States since June 1913.

7. That pursuant to the said warrant the petitioner was arrested in August 1949, released under $2,000.00 bail, and remained at large on bail until October 23, 1950.

8. That a deportation proceeding is presently pending against the petitioner based upon the charges set forth in the aforementioned warrant.

9. That the petitioner was taken into custody on the 23rd day of October, 1950, by the respondent under the provisions of Section 23 of the Subversive Activities Control Act of 1950.

10. That the necessity for the Subversive Activities Control Act, as set forth in the Act itself, is, in part, as follows:

> "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its
> 16 stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

11. That on May 25, 1949, the petitioner was a member of the Communist Party and was financial secretary of the Hamtramck Section of the Communist Party of Michigan for the year 1949.

12. That on the 23rd day of October, 1950, the United States Department of Justice had in its possession information to the effect that the petitioner was a member of the Communist Party, and that he was financial secretary of the Hamtramck Section of the Communist Party of the State of Michigan for the year 1949.

13. That on the 7th day of November, 1950, the adjourned hearing on the petition for writ of habeas corpus filed herein was

resumed and extended over to the 8th day of November, 1950; and that on the 7th and 8th days of November, 1950, the petitioner, while testifying in support of his petition for a writ of habeas corpus, did not testify that he was not a member of the Communist Party.

14. That during the hearing on the said petition the petitioner offered no testimony or evidence to the effect that he is not presently a member of the Communist Party.

15. That on the 23rd day of October, 1950, the petitioner was a member of the Communist Party.

16. That the petitioner, while under cross-examination by the Chief Assistant United States Attorney, was a consistently
17 evasive witness and his evasive demeanor in testifying in relation to his communistic activities convinces this Court that he is knowingly and wilfully participating in the Communist movement.

17. That this Court finds that there has been no abuse of discretion by the Attorney General in continuing the petitioner in custody without bond.

Conclusions of Law

1. The action of the Attorney General in the instant matter is authorized by that part of the Subversive Activities Control Act of 1950 which reads as follows:

> "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole." (Section 23.)

2. The petitioner, after being released on bail in the deportation proceedings, remained in the constructive custody of the Department of Justice so that it was not necessary to issue a new warrant to re-take him into actual custody.

3. Section 23 of the Subversive Activities Control Act of 1950 provides for continuing in custody an alien who has been previously taken into custody under a warrant of the Attorney General if the said alien is the subject of a pending deportation proceeding, and thereby a re-taking into actual custody of this petitioner is within the contemplation of this statute.

4. Section 23 of the Subversive Activities Control Act of the Internal Security Act of 1950 authorizes the continued custody

of the petitioner without bail within the discretion of the Attorney General.

18 5. That this court has jurisdiction to review the action of the Attorney General of the United States in exercising his discretion of continuing the petitioner in custody without bail. (United States ex rel. Potash v. District Director of Immigration and Naturalization, 2 Cir., 169 F. 2d 747; Colyer v. Skeffington, D. C., 265 F. 17; United States ex rel. Pappis v. Tomlinson, D. C., 45 F. Supp. 447; Yanish v. Phelan, et al., 86 F. Supp. 461.)

6. That the action of the Attorney General in continuing petitioner in custody under the provisions of the Subversive Activities Control Act of 1950 does not violate the First, Fifth, and Eighth Amendments of the Constitution of the United States.

7. That the petitioner, through his counsel, Mr. Alan Brown, has conceded that if this Court determines that it has jurisdiction to review the action of the Attorney General in continuing the petitioner in custody without bail, then, and in that event, Section 23 of the said Act in not unconstitutional.

8. In reviewing the action of the Attorney General under the provisions of this Act the petitioner has the burden of establishing abuse of discretion. He must make a "clear and convincing showing as would justify the District Court in holding there has been an abuse of discretion." United States ex rel. Potash v. District Director of Immigration and Naturalization, 2 Cir., 169 F. 2d 747. (Yanish v. Phelan et al., 86 F. Supp. 461; United States ex rel. Doyle v. District Director of Immigration and Naturalization at Port of New York; United States ex rel. Eisler v. District Director of Immigration and Naturalization at Port of New York; United States ex rel. Williamson v. District Director of Immigration and Naturalization at Port of New York; United States ex rel. Smith v. District Director of Immigration and Naturalization at Port of New York (two cases), 169 F. 2d 753.)

9. That the petitioner has failed to make any showing that would justify this Court in holding that there has been an abuse of the discretion vested in the Attorney General under the
19 provisions of Section 23 of the Subversive Activities Control Act of 1950 in continuing the petitioner in custody without bail; and that accordingly this Court concludes that there has been no abuse of discretion by the Attorney General.

10. In appearing as a witness in his own behalf, the petitioner had ample opportunity to testify that he was not a member of the Communist Party and part of the Communist movement in the United States as of the date of his arrest on October 23, 1950.

It is, therefore, ordered that the within petition for writ of habeas corpus be, and the same hereby is denied.

Dated at Detroit, Michigan, this 10th day of November, A. D. 1950.

(S.) THOMAS P. THORNTON,
United States District Judge.

In United States District Court

TRANSCRIPT OF TESTIMONY

Transcript of testimony taken in the above-entitled matter before Honorable Thomas P. Thornton, District Judge, at Detroit, Michigan, on Monday, October 30, Tuesday, November 7, and Wednesday, November 8, 1950.

Appearances: Alan N. Brown, Esq., and Mitchell Schmaar, Esq., appearing on behalf of the Petitioner, John Zydok. Joseph C. Murphy, Esq., Assistant United States Attorney, appearing on behalf of the Government. Harry Kobel, Esq., District Adjudications Officer for the Immigration and Naturalization Service, Detroit.

Detroit, Michigan,
Monday, October 30, 1950
2 o'clock, P. M.

(Previous to the following testimony there was discussion and argument, which was reported but is not here transcribed.)

* * * * * * *

20 COLLOQUY

Mr. BROWN: Now, I ask the United States Attorney to show on the record in the testimony the specific authority for arresting this alien.

The COURT: That is in the record, in the warrant attached to the return.

Mr. BROWN: The warrant attached to the return is a warrant that was issued in 1949.

The COURT: That is right.

Mr. MURPHY: As I take it, he denies that this man was arrested under that warrant, so we are prepared to show he was arrested under that warrant, and that it was on the order of the Attorney-General.

The COURT: All right.

Mr. MURPHY: Mr. Kobel.

KOBEL, HARRY, was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. MURPHY:

The CLERK of the COURT: Your name?
The WITNESS: Harry Kobel.

By Mr. MURPHY:

Q. Your occupation, Mr. Kobel?
A. I am District Adjudications Officer for the Immigration and Naturalization Service in Detroit.
Q. That is a bureau of the Department of Justice; is that correct?
A. That is correct.
Q. As such, are you familiar with the matter of one John Zydok?
A. I am.
Q. Can you tell us now when this man was last taken into custody?
A. He was taken into custody last Monday or Tuesday. I don't remember the exact date.
Q. Can you tell us on what process, if any, he was taken into custody by your agency?
21 A. The process used was a warrant of arrest that had been issued for Mr. Zydok some time in 1949, and pursuant to radiographic directions we had received from the Department on October 23, and supplemented by subsequent radiograms on October 25.

Mr. MURPHY: Mark this, please.

(A warrant of arrest re. John Zydok, dated June 30, 1949, was thereupon marked Government's Exhibit 1 by the reporter.)

By Mr. MURPHY, continuing:

I will show you Government's proposed Exhibit 1 and ask you whether or not you identify that as the warrant upon which the petitioner was arrested? (Handing exhibit to the witness.)
A. That is correct.

Mr. MURPHY: I offer Government's Exhibit No. 1. (Handing exhibit to Mr. Brown.)
Mr. BROWN: No objection.
The COURT: It may be admitted.

Was that the original of the warrant that is set out in the return?

Mr. MURPHY: That is the original of the warrant that is set out in the return.

The COURT: All right.

By Mr. MURPHY, continuing:

Q. Now, you said he was taken into custody then and ordered continued into custody upon directions you received by radiogram?

A. That is right.

Mr. MURPHY: Mark these, please.

(A copy of a radiogram dated October 21, 1950, to "District Director, Detroit," from "Kelly," was thereupon marked Government's Exhibit 2 by the reporter.)

(A document was thereupon marked Government's Exhibit 3 by the reporter.)

(A copy of a radiogram dated October 25, 1950, to "District Director, Detroit," from "Mackey," was thereupon marked Government's Exhibit 4 by the reporter.)

By Mr. MURPHY, continuing:

Q. I will show you Government's proposed Exhibit No. 2 and Government's proposed Exhibit No. 4 and ask you whether or not you can identify those papers? (Handing exhibits to the witness.)

22 A. Yes, I can.

Q. And can you identify those as being part of the files and records of your office?

A. Yes. These copies were made at my direction, and they are exact copies of original radiograms which are on file in our office as part of the John Zydok file.

Q. And are those two papers that you hold in your hand there papers that would be made in the regular and ordinary course of the business of your agency?

A. Yes, sir.

Q. And you say they are a part of your files and records?

A. That is correct.

Q. I show you, again, Exhibit No. 2. That is not a complete copy, is it, of a radiogram?

A. No, that is the portion of the radiogram that specifically related to John Zydok.

Mr. MURPHY: I see. I offer Exhibits No. 2 and 4. (Handing exhibits to Mr. Brown.)

Mr. BROWN: No objection.

The COURT: They may be admitted.

Mr. BROWN: Will you read them into the record?

Mr. MURPHY: Yes. Exhibit No. 2:

(Reading):

EXHIBIT 2

"Wash FLD 1705 Oct. 21

"District Director Detroit

"Apprehend immediately and detain the following aliens pursuant to section twenty of nineteen seventeen act as amended by Internal Security Act Colon * * * John Zydok.

(Signed) "KELLY."

EXHIBIT 4, RADIOGRAM

(Reading):

"Wash FLD 1545 Oct 25

"District Director Detroit

"By authority of the Attorney-General delegated to me by section nine zero one of title eight CFR paren twelve F R 23 five zero seven two July thirty-one nineteen forty seven paren under section three seven of the alien registration Act of nineteen forty-eight USC four five eight you are directed to detain John Zydok under section twenty of the immigration act of nineteen seventeen as amended by the Internal Security Act of nineteen fifty pending further instruction stop The taking into custody automatically cancelled the bond stop Do not release under bond.

"MACKEY."

By Mr. MURPHY, continuing:

Q. Now, Mr. Kobel, do you know a man in your agency by the name of "Kelly"?

A. I do.

Q. And what is his capacity?

A. He is the Assistant Commissioner for Enforcement in the central office of the Immigration and Naturalization Service.

Q. Located where?

A. In Washington, D. C.

Q. And do you know a man by the name of Mackey?

A. Yes, sir. That is A. E. Mackey who is acting Commissioner of Immigration and Naturalization in Washington.

The COURT: Is that the same "Kelly" that signed the warrant?

A. Yes, your Honor.

The COURT: Issued in 1949, on the 30th day of June?

A. Yes, your Honor.

Mr. MURPHY: That is all.

CROSS EXAMINATION.

By Mr. BROWN:

Q. Mr. Kobel, did you receive any other instructions since those two radiograms were sent you?

A. Pertaining to Mr. Zydok?

Q. Yes.

A. No.

Q. Did you receive any instructions at all as to why Mr. Zydok was sought to be re-arrested?

24 A. No.

Q. You have personal knowledge, I believe you testified, as to the Zydok file, do you not?

A. Yes.

Q. When he was first arrested there was bail set at $2,000, was there not?

A. Yes; in accordance with the terms of the warrant, that is correct.

Q. And he did supply that bail, did he?

A. My recollection is that he did.

Q. And did the bail have a reporting provision contained therein?

A. I don't recollect that particular feature. It may have had.

Q. Well, practically all of the bail bonds that were issued at that time in 1949 contained these reporting provisions, did they not, in your district?

A. Some of them did.

Q. Don't you recall whether this particular bond had the reporting provision contained in it?

A. No, I can't recall this particular bond.

Mr. MURPHY: I submit at this particular time this line of questioning by counsel is irrelevant and immaterial. We are now establishing what we alleged in our return, and I think the questioning of Mr. Brown at this time is directed to the discretionary power exercised by the Attorney-General which, as far as I know, isn't an issue yet.

The COURT: I think that is your object, is it not, Mr. Brown?

Mr. BROWN: The object is to show that the Attorney-General, in arresting Mr. Zydok, did so and abused his discretion in refusing to grant bail. Now, I cannot show the latter without showing first what this man did while he was under the same warrant of arrest and was released under that warrant of arrest.

Mr. MURPHY: If that is the situation, I wonder if Mr. Brown will now admit that this man was arrested upon the direction of the Attorney-General?

Mr. BROWN: Yes, I will admit that he was.

Mr. MURPHY: All right.

25 The COURT: All right.

By Mr. BROWN, continuing:

Q. Mr. Kobel, you said on direct examination that you had personal knowledge of the John Zydok file?

A. Yes.

Q. And was in charge of it.

A. No, I didn't say I was in charge of it.

Q. You had personal knowledge of it?

A. Yes.

Q. Do you know whether or not Mr. Zydok faithfully reported as requested so to do under the provisions of his bail bond?

Mr. MURPHY: Now, just a minute.

The COURT: The question is based on a false premise, isn't it?

Mr. MURPHY: That is right. And, further, it is the Government's position that the question of abuse of discretion by the Attorney-General is at this point not reviewable by the Court. We would like to submit argument on that.

If that is the issue now—

The COURT (Interposing): You have announced that is the issue, have you not?

Mr. BROWN: Yes. I am prepared to argue that.

The COURT: That the Attorney-General has abused his discretion and that I, as a District Court, have a right to review that question and to ascertain whether or not there was such an abuse.

Mr. BROWN: That is correct.

The COURT: It is your contention I don't have the right to review it?

Mr. MURPHY: That is correct, your Honor.

The COURT: Well, we better argue that right now.

Mr. MURPHY: I think that is the issue.

(The witness was thereupon temporarily excused from the stand.)

* * * * * * *

(Thereupon followed discussion and argument of counsel, which was reported but is not here transcribed, following which the matter was adjourned.)

26 Detroit, Michigan,
Tuesday, November 7, 1950,
2:30 o'clock P. M.

(Discussion was had between Court and Counsel, which was reported but is not here transcribed.)

Mr. BROWN: May I recall Mr. Kobel to the stand for the purpose of cross-examination?

The COURT: All right.

KOBEL, HARRY, thereupon resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

CROSS EXAMINATION (continued).

By Mr. BROWN:

Q. Mr. Kobel, since we were in court the last time, since you were on the stand on the previous hearing, have you received any further notice from the Attorney-General or the Attorney-General's Office giving any reasons for the re-arrest of John Zydok?

A. Not to my knowledge.

Q. Do you know whether or not anyone else in your office has received further instructions or reasons as to the continued detention of Mr. Zydok?

A. What notice are you referring to? I believe I produced in court copies of two radiograms. I believe the last one was dated October 25, in which were informed by Central Office, by the Acting-Commissioner, that bond would not be set.

I don't know of any notice or any instructions received after October 25.

Q. Have you received any other since that time, you or your office received any reason from the Attorney-General or the Attorney-General's Office for the re-arrest of Mr. Zydok, or why bail is being refused him?

A. I haven't received anything. I haven't received any instructions.

27 Q. Do you know whether or not your office has received any such instructions?

A. Not to my knowledge.

Q. Mr. Zydok was arrested under the original warrant in July of 1949, was he not?

A. I have to see the original warrant, but I believe it was about that.

Q. And at that time $2,000 bail was set for Mr. Zydok by the Attorney-General?

A. That is correct.

Q. And that bond was posted?

A. That is right.

Q. And, as of this date it is still in your possession?

A. No. The bonds may be in our physical possession, but I know to my own knowledge that bond was cancelled and notice was sent to the bondsman to pick up the security.

Q. But, so far as you know, the securities have not at this time been picked up?

A. Well, that isn't in my department. I wouldn't know.

Q. Was one of the conditions of the bail of Mr. Zydok a requirement to report to the Department?

A. There is a general provision in all Immigration bonds that he shall report for hearings when called. Whether there was any additional provision, I would have to see the bond.

Q. You don't have that in your file?

A. It may be here.

Q. Do you want to check that?

Mr. MURPHY: I am advised that it is not in the file that we have here; that it is in the Parole Section.

The WITNESS: It may be that the bond did contain a reporting provision, because some of the bonds did contain that reporting provision.

By Mr. BROWN, continuing:

Q. Do you know whether or not Mr. Zydok reported regularly?

A. Again, that isn't my division, but I believe that he did report, at least to my knowledge.

Q. Do you know of any transgressions or violations of law that Mr. Zydok committed during the time he was on parole?

28 Mr. MURPHY: Just a minute. I object to that on the grounds that it is immaterial to the issues here as to what he knows. He isn't the man that determines whether or not this man should be continued on bond. So, I submit that whether he knows or whether he doesn't know would be immaterial to the issues in this hearing.

Mr. BROWN: May it please the Court, in reply to that, Mr. Kobel has already testified that he is in charge of the proceedings—

The WITNESS (Interposing): I didn't so testify. I specifically stated on two—

Mr. BROWN: (Interposing): I apologize.

The WITNESS (Continuing): —occasions that I was not in charge of the case. I had knowledge of the case.

Mr. BROWN: No. Rather, of the proceedings at the Immigration and Naturalization Service.

The WITNESS: I am not in charge of the proceedings in this case.

By Mr. BROWN, continuing:

Q. What is your connection with the Immigration and Naturalization Service, Mr. Kobel?

A. I am District Adjudications Officer. As such, I am a staff officer, and, in general have knowledge of all our proceedings.

The COURT: I will sustain the objection.

By Mr. BROWN, continuing:

Q. Do you know of any violation of law that Mr. Zydok committed after the passage of the McCarran-Wood Act, between that date and the date he was arrested by the Attorney-General?

A. I have had no personal contact with Mr. Zydok. I can't testify either way on that question.

Q. Do you know of your personal knowledge, Mr. Kobel, of any reason why Mr. Zydok was arrested, except for the passage of the McCarran-Wood Act?

A. Yes; we received instructions from the Acting-Commissioner to take Mr. Zydok in custody.

Q. In other words, you yourself exercised no discretion in carrying out that particular order; is that correct?

A. No; we acted on instructions from the Acting-Commissioner.

Mr. BROWN: That is all.

29 REDIRECT EXAMINATION.

By Mr. MURPHY:

Q. You are familiar with the fact, are you not, Mr. Kobel, that Congress did enact, during the 81st Session of Congress at their Second Session, the Subversive Activities Control Act?

A. I am aware of that.

Mr. MURPHY: No further questions.

Mr. BROWN: That is all. You may step down.

(The witness was thereupon excused.)

* * * * * * * *

Mr. BROWN: Mr. Zydok, would you take the stand.

ZYDOK, JOHN, the Petitioner herein, was thereupon called as a witness in his own behalf, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. BROWN:

The CLERK OF THE COURT: Your name?
The WITNESS: John Zydok.
The COURT: Keep your voice up, now, Mr. Zydok, so that we can all hear you.

By Mr. BROWN:

Q. How old are you, Mr. Zydok?
A. Thirty-four.
Q. Your age?
A. I am fifty-four.
Q. When did you arrive in the United States?
A. 1913.
Q. 1913. From what country?
A. From Poland.
Q. And have you lived in the United States all the time since 1913?
A. All the time.
Q. What type of work do you do?
A. I am working in a restaurant right now.
Q. Do you own any property?
A. Yes, I do.
Q. What kind of property do you own, and where is it located?
A. House in Detroit.
Q. What is the address?
A. 13454 Main Street.
Q. And what kind of property is that?
A. House.
Q. I mean, is it a single home or two-flat?
A. Single home.
Q. How many rooms?
A. Five rooms.
Q. Do you have a family?
A. I do.
Q. How many children?
A. I got three children, two sons and a daughter.
Q. And do any of them live with you?
A. No, just my wife.
Q. Do you have any grand-children?

A. I got five.

Q. Did any of your sons serve in the Armed Forces of the United States?

A. Both of them.

Q. In what war?

A. The last war.

Q. In World War II?

A. I didn't get you.

Q. In World War II?

(No response.)

Q. Is your daughter married?

A. Yes, she is married.

Q. Were your children born in this country?

A. Yes, in this country.

Q. Were your grand-children born in this country?

A. Yes, in this country.

Q. During World War II, Mr. Zydok, did you engage in any patriotic conduct in behalf of the United States?

A. I don't get you.

Q. Did you do anything that your considered patriotic on behalf of the United States in the last war?

(No response.)

Q. Let me put it this way, Mr. Zydok: Did you sell any Bonds?

A. Yes, I did.

31 Q. About how many?

A. About 50,000, I sold myself.

Q. About $50,000 worth of Bonds. Did you donate any blood to the Red Cross?

A. I donated seven times where I worked, for the United States Army.

Q. Were you required to report regularly to the Department of Immigration and Naturalization Service after your first arrest and release on bail in August of 1949?

A. Yes, I did.

Q. How often did you report at that time?

A. Since I started, I was reported every week. Then, I forgot when; they call me every month. I report every month.

Q. Did you report regularly?

A. Regularly every month.

Q. And during that time did you leave the State of Michigan? Did you leave the State of Michigan during that time?

A. No, I didn't.

Q. Did you do ——

A. (Interposing): I don't know.——

Q. (Continuing): Did you do whatever was requested of you to do while you were reporting, Mr. Zydok?

(No response.)

Q. Did you do what was requested of you to do while you were reporting? Do you know what I mean by that?

A. I don't get you.

Q. Whatever the Department of Immigration and Naturalization Service told you to do while you were reporting, did you do that?

A. Yes, I did.

Q. Have you been told why you were re-arrested in October, 1950?

A. I forgot. I guess it was——

Q. (Interposing): No. Did anyone tell you why you were arrested?

A. I forgot.

Q. Have you violated any laws since the passage of the McCarran-Wood Act?

A. I don't think so.

32 The COURT: Is the answer he doesn't think so?

Mr. BROWN: Yes.

By Mr. BROWN, continuing:

Q. If you were released on bail, Mr. Zydock, would you, if requested to report, report regularly to the Department of Immigration and Naturalization Service?

A. Yes, I did regularly.

The COURT: What is the answer?

A. Yes, I did regularly.

The COURT: I don't think he actually understood your question.

By Mr. BROWN, continuing:

Q. Mr. Zydok, if you were released on bail by this Court today and required to report to the Immigation and Naturalization Service, would you willingly report?

A. Yes, I will.

Q. Any reason why you should not report?

A. No reason.

Q. Is there any reason why you would want to leave the country?

(No response.)

Q. If you were released on bail today, is there any reason why you should want to leave the country, the United States?

(No response.)

Q. Do you understand that?

A. I don't get that.

Q. Do you want to leave the United States, Mr. Zydok, or do you want to live here?

A. I want to live here in this country.

Q. And, if you were released on bail, would you stay in this country?

A. I will.

Q. And comply with whatever order the Court made?

A. I will.

Mr. BROWN: You may cross-examine.

33 CROSS EXAMINATION.

By Mr. MURPHY:

Q. You say you are 54 years old, Mr. Zydok?

A. 54.

Q. And you have been here since 1913?

A. That is right.

Q. Is that correct?

A. That is correct.

Q. And, so, you were in this country in 1914; is that right?

A. '14 or '13; I forgot.

Q. '14, '15, '16, and '17?

A. Yes.

Q. Were you in the Armed Services of the United States?

A. No, I wasn't.

Q. I see. And why did you leave Poland?

A. Why? I look for better living.

Q. Looking for better living. There was a war on in Europe at that time, is that right, or clouds of war were hanging over Europe?

A. That was just before the war.

Q. That was just before the war. So, you came to the United States. Did you ever make application for citizenship papers in this country?

A. I did.

Q. When was that?

A. I forget what year.

Q. What happened to them?

A. I make application in Rhode Island State, and I left Rhode Island and I forget until it was too late for me.

Q. Until it was what?

A. It was late. I have to apply again.

Q. Did you ever make final application? You say you filed your first papers in Rhode Island; is that it? You filed some papers in Rhode Island?

A. I just make application for it.

Q. Did you ever go through and attempt to get your final papers?

34 A. No, I didn't.

Q. You never did that?

A. No, I did not.

Q. When was that you made application in Rhode Island?

A. I forget the date and year.

Q. Approximately. Was it right after you got to this country?

A. It was between '20 and '30. Between 1920 and 1930, something like that.

Q. I see. You say you sold $50,000 worth of War Bonds?

A. Yes, I did.

Q. Is that right? When did you start selling those War Bonds?

A. When I worked in the restaurant I sold them to my customers in the restaurant.

Q. When was that?

A. I can't tell you the dates.

Q. Well, can you tell me, was it before or after Pearl Harbor? Do you remember when Pearl Harbor was bombed?

A. Yes. After.

Q. It was after that; is that right? The Federal Government had been selling Defense Bonds prior to that time, hadn't they, do you recall?

A. I don't know what you mean.

Q. Did you sell any bonds in this—any Government Bonds prior to the time Russia was invaded by the Germans?

A. I don't understand what you mean.

Q. You don't understand that. Was Russia invaded by the Germans?

A. I don't understand what you mean.

Q. You don't understand that. And, you don't know whether the Nazi Government attacked or invaded Russia or Poland?

A. Yes, I remember.

Q. You remember that?

A. Yes.

35 Q. Is that right? Had you sold any United States Government Bonds prior to that time?

A. I can't tell when it was.

Q. You say you are a waiter in a restaurant; is that right?

A. That is right.

Q. How long have you acted as a waiter in a restaurant?

A. The last 17 years, I think. I am not sure on dates.

Q. And in just one restaurant?
A. Two restaurants.
Q. Two restaurants. And what were the names of those two restaurants?
A. Detroit Workmen's Cooperative Restaurant.
Q. The what?
A. Detroit Workmen's Cooperative Restaurant.
Q. Detroit Workmen's Cooperative Restaurant. And where is that located?
A. In Hamtramck.
Q. Is that where you have been presently employed?
A. Right.
Q. What is your—do you have any position there other than that of waiter?
A. Head Waiter, that is all.
Q. You are the head waiter?
A. Head Waiter.
Q. Do you have any duties other than waiting on tables in connection with that restaurant?

(No response.)

Q. All you do is wait on table; is that it?
A. Head Waiter. I got to watch everything in the restaurant.
Q. You watch everything in the restaurant. By that you mean you are the manager of the restaurant?
A. Not really.
Q. Pardon?
A. Not really manager.
Q. Not real manager?
A. Not real manager.
Q. Who is the real manager?
A. Oh, they have got the other people.
36 Q. Well, who?

Mr. BROWN: I object to that as immaterial.
The COURT: You may take the answer.
A. I don't want to mention the other names.

By Mr. MURPHY, continuing:

Q. Pardon?
A. I don't want to mention the other names.
Q. You don't want to mention the other names. Why don't you want to mention the other names?
A. Well, the head of the committee, not the other manager, but the committee managers, both restaurants.
Q. The committee manages both restaurants; is that right?

A. That is right.
Q. Who is on the committee?

Mr. BROWN: I object to that as being immaterial and incompetent, and has no bearing in this proceeding.

The COURT: You asked him about certain patriotic actions he engaged himself in, so certainly Mr. Murphy has a right to inquire into other acts or other associttions to indicate whether or not his patriotism is a real patriotism, I would think. So, I would say the answer to the question is material.

Mr. BROWN: That may be true. I don't doubt that at all. But, has he a right to inquire who is manager, or who the owner is, or who the partners are in the corporation under which he works?

The COURT: Yes, I would say so. Go ahead.

A. Nick Polechuk,

By Mr. MURPHY, continuing:

Q. Who?
A. Polechuk.
Q. Polechuk. Will you spell that, please?
A. I can't spell no names. I can write if you give me a piece of paper.
Q. You write on this paper the names of the committee that manages that restaurant (handing a piece of paper to the witness.)
A. All the names?
Q. All the names.

(The witness thereupon wrote the following names on the piece of paper: N. Fich, N. Polechuk, H. Waitowich.)

37 Q. Do you have just three of them; is that right?
A. President, secretary and treasurer.
Q. All right. Who is the president?
A. Nick Fich.
Q. Nick what?
A. Nick Fich.
Q. Yes. And who is the secretary?
A. Nick Polechuk.
Q. And who is the treasurer?
A. Harry Waitowich.
Q. I didn't get that.
A. You can read.
Q. Can you pronounce it again?
A. Harry Waitowich.

The COURT: Has he identified the other restaurant, Mr. Murphy, by name? I just recall one.

By Mr. MURPHY, continuing:

Q. What is the name of the other restaurant?

A. Same name.

Q. Same name. And that is the Detroit Workmen's Cooperative Restaurant?

A. That is right.

Q. And where is that other restaurant located?

A. One on Yemans, 2934 Yemans, and one 9234 Joseph Campau.

Q. And do you act as head waiter for both of these restaurants?

A. One.

Q. And which one is that?

A. Joseph Campau.

Q. Joseph Campau. You say these three men, the names of which you have written on this paper, are the committee. Do they direct the operation and the policy of those restaurants?

A. Yes.

Q. Is that correct?

A. That is right.

Q. Who owns the restaurants?

A. A bunch of owners. I don't know how many, and I don't know their names. You have to go to the committee and find out
38 how many, because I haven't got nothing to do with the office.

Q. As a matter of fact, isn't it true that those restaurants are owned by the Communist Party of Michigan?

A. No, that is not true.

Q. They are not. Does the Communist Party of Michigan have anything to do with those restaurants?

A. No, they got nothing to do.

Q. They have nothing to do with them?

A. They got nothing to do.

Q. Do you know whether or not Mr. Fich, the president of those restaurants, is a member of the Communist Party?

A. I don't know.

Q. You don't know that. Do you know whether or not the man you have named as secretary is a member of the Communist Party?

Mr. BROWN: I object to that as incompetent, irrelevant and immaterial, as having no bearing at all upon this hearing and the testimony that this man gave on direct examination.

The COURT: I will take the answer.

Mr. BROWN: For the record, your Honor, may I have an exception after I am overruled, automatically?

The COURT: Yes, you may have that exception.

Mr. BROWN: Without so stating it.

The COURT: Yes.

Mr. BROWN: Thank you.

By Mr. MURPHY, continuing:

Q. Do you know whether the secretary whose name you have written on this paper is a member of the Communist Party?

A. I don't know.

Q. You don't know. Do you know whether or not he is awaiting deportation?

(No response.)

Q. Do you know whether or not there is a warrant of deportation issued for him?

A. Yes, I do.

Q. You know that, don't you?

A. I know that.

Q. And you know what he was charged with, don't you?

39 A. I don't know.

Q. You don't know that. And, what about Mr. Waitowich, the treasurer? Do you know whether or not he is a member of the Communist Party?

A. I don't know.

Q. You don't know that. How many children did you say you had?

A. Three.

Q. Three. Were those sons or daughters?

A. Two sons, one daughter.

Q. Two sons, one daughter. Did you say two of those sons fought in the Armed Services?

A. They were in the Army.

Q. Two of your sons?

A. Two of my sons.

Q. Now, have you ever been a member of the Communist Party?

Mr. BROWN: I object to that.

The COURT: Take the answer.

Mr. BROWN: On the ground that it may tend to be incriminating.

The COURT: Take the answer.

A. I can't answer that question.

By Mr. MURPHY, continuing:

Q. Pardon?

A. I can't answer that question.

Q. You say you refuse to answer that question?

A. I can't answer in order to incriminate myself.

Q. You say you refuse to answer that question because it might incriminate you; is that right?

A. That is right.

Q. Why?

Mr. BROWN: I object to that last question because it calls for a legal conclusion.

Mr. MURPHY: Well, he has made the statement.

The COURT: He is the one that is invoking the constitutional guarantee, and my understanding is he is the only one that can invoke it. I think Mr. Murphy has a right to inquire into his reasons for not answering the question.

He has given a reason, but Mr. Murphy certainly has a right, particularly in view of your direct examination,—in other words, Mr. Brown, you have by your direct examination established or attempted to establish this person in the category of a patriotic American citizen. Now, you can't leave that impression hanging in the air, and Mr. Murphy has a right to go at great length into the category that you have placed your witness in,—that of a patriotic citizen.

Mr. BROWN: Well, the major questions that must be determined by this Court are those set forth in the Potash case and reviewed by Judge Koscinski in his recent opinion.

The COURT: Just a minute, now. Don't get confused. I am not required to follow the decisions of other District Judges. There is nothing that I know of that requires me to follow the decision of a Court of equal jurisdiction.

I don't know what—I haven't read Judge Koscinski's opinion. I don't know whether the facts in the case he had before him are similar to the facts in the case I have before me, because, first, I don't know what the facts are in his case. I know a little something about it.

Second, I don't know all the facts in this case.

So, at this particular point in the proceedings I am giving no credence to any decision of any Court because I have not got all the facts before me yet.

But, I do know the rules of evidence, and I know you can't establish a person in the category of a patriotic citizen and then deny the opposition the right of cross-examination on that very point.

Mr. BROWN: I did it for the purpose of showing there were no acts of disloyalty in which he engaged.

The COURT: Then I am supposed to permit that testimony to remain as you adduced it from the witness and not permit Mr. Murphy to go in and develop anything he might on cross-examination?

Mr. BROWN: No. He has a right to cross-examine, but only by showing acts of disloyalty and disservice and disaffection.

The COURT: My offhand view is that that is what his efforts are directed toward, if you are listening to the same testimony I am.

Don't forget the Preamble in the front of the Act, the Preamble of this McCarran-Wood Act.

41 Go ahead.

By Mr. MURPHY (continuing):

Q. Now, you say, Mr. Zydok, that if you answer that question that it will incriminate you, is that right, and you are refusing to answer on that ground?

A. That is right.

Q. Now, why will it incriminate you?

A. I don't know how to explain it to you.

Q. Pardon?

A. I don't know how to explain it to you.

Q. Well, you say——

A. (Interposing): I don't understand.

Q. You say you don't know how to explain it. Why did you say it?

(No response.)

Q. Did somebody tell you to say it?

A. Nobody told me.

Q. — told you to say it. So, you say that it is going to incriminate you; is that right?

A. That is right.

Q. If you say it is going to incriminate you, you must know the reason why it will incriminate you; don't you?

A. Yes, I do, but I don't know how to explain.

Q. Well, have you done something through your actions that are a violation of law?

(No response.)

Q. You may recall now, my question is whether you were ever a member of the Communist Party?

A. I can't answer that question.

Q. Pardon?

A. I can't answer that question.

Q. You can't answer that question. And, is it because you don't know?

Mr. BROWN: I submit, if the Court please, he has already answered it. He refuses to answer it because it tends to incriminate him.

The COURT: I think there is another question in there: "Have you done something to violate the law?"

Is that the question, Mr. Murphy?

Mr. MURPHY: That was originally, your Honor. He said he did not know. I believe that was his answer.

42 The COURT: I did not know that he had answered that particular question. I don't think he has made an answer to it yet.

Mr. MURPHY: I will re-ask it, then.

By Mr. MURPHY (continuing):

Q. Have you done something? You say you don't want to answer because you might incriminate yourself. Is it because, then, that you have done something that may be a violation of law?

A. I don't know much about the law.

Q. You don't know much about the law. Well, you know enough to say that you don't want to answer because you might incriminate yourself, don't you?

Mr. BROWN: If the Court please, I object to that as being an ambiguous question, because the only question which he refused to answer was whether or not he ever was a member of the Communist Party.

The COURT: Oh, no. He said—the last answer was that, when Mr. Murphy asked him if he might have done something, might have violated the law, I believe his answer was that he didn't know; he doesn't know much about the law; or something to that effect. Now Mr. Murphy, I believe, is testing his credibility on his last answer.

That is what, I presume, your object is (addressing Mr. Murphy.)

Mr. BROWN: That last question was ambiguous because it doesn't refer to any act of his which might be violating the law, or whether it refers to the original question of whether or not he has ever been a member of the Communist Party.

The COURT: I think I follow Mr. Murphy to the extent he is trying to test the witness' credibility in relation to his answer that he does not know anything about the law.

Mr. BROWN: That is not my understanding of the question.

Mr. MURPHY: That is what it is directed to. This man said he doesn't want to answer because he may incriminate himself, and then he answers in the next breath that he doesn't know anything about the law.

The COURT: Now by your question you are testing the credibility of his answer.

43 On one hand the witness, under his own impulse, invokes his Constitutional right, and then in his next breath he says he does not know anything about the law, so obviously the interrogator has a right to go into the subject.

Mr. BROWN: It may be that the question was not propounded in such a manner that this witness can understand it.

Mr. MURPHY: Well, let us read the question again.

The REPORTER (Reading):

"Q. You don't know much about the law. Well, you know enough to say that you don't want to answer because you might incriminate yourself, don't you?"

Mr. BROWN: That is an ambiguous question because that question does not relate to whether or not he refused to answer the first question as to whether or not he ever had been a member of the Communist Party. If Mr. Murphy will reframe it, it will be a proper question.

Mr. MURPHY: I think it is proper right now.

The COURT: Go ahead.

By Mr. MURPHY (continuing):

Q. You know enough about the law to make the statement that an answer to my question might be sufficient to incriminate you; is that right?

A. That is right.

Q. You know that much about the law; right?

A. That is right.

Q. All right, Now what is it you have done or may have done that would incriminate you, that would be a violation of law?

Mr. BROWN: I object to that question, if the Court please, because it is highly improper for this reason: The United States Attorney is trying to get by indirection what he can't get by direct questioning. He cannot elicit an answer from a question which, if given, might incriminate him, so he turns the question around and says, "What did you do that you refuse to answer?" And, the Courts have upheld you cannot do that.

The COURT: I think that objection is well-taken.

By Mr. MURPHY (continuing):

Q. I will put it this way: Without asking you to disclose
44 what you may or may not have done, I will ask you if you have done something that would be a violation of law?

(No response.)

Q. Did you hear that question?

A. What was the last question you asked?

Mr. MURPHY: Will you read the question to him, please?

(The last question was thereupon read by the reporter.)

A. I don't know what I done against the law.

Q. You don't know that you have done anything against the law, do you?

A. I don't know.

Q. Pardon?

A. I don't know.

Q. You don't know. Then, I will ask you again whether you have ever been a member of the Communist Party?

Mr. BROWN: I submit, if the Court please, that he was asked the question previously and he gave the answer at that time that he refuses to answer on the ground it might incriminate him.

Mr. MURPHY: Well, I submit, if it please the Court, before he can invoke his Constitutional privilege on that ground, he has to make a showing that such an answer would incriminate him.

The COURT: I think you are right.

Mr. BROWN: The United States Attorney is taking advantage of the fact that this witness does not know too well the English language.

The COURT: There isn't—that hasn't been established in this proceeding as yet. The man came to this country in 1913. He has three children and five grand-children born in the country, and has for a great number of years been a waiter, a head waiter, in what, I presume, is an English-speaking restaurant. As far as I know, there is no proof to the contrary. And, so far at least——

Mr. BROWN (Interposing): Can your Honor not see from the demeanor of the witness on the stand, the way he talks, the way he answers, that he does not know too well the English language?

45 Mr. MURPHY: He had no trouble answering your questions, Mr. Brown.

Mr. BROWN: Maybe I put them more simply than you did.

Mr. MURPHY: Maybe you did.

The COURT: That is beside the issue. I haven't had exhibited to me, at least so far, the fact that this witness doesn't comprehend the English language.

Mr. BROWN: I didn't say that, your Honor. I said he doesn't understand it too well, because even on direct examination I had to repeat and simplify some of the questions, as you recall.

The COURT: Do you think we need an interpreter?

Mr. BROWN: I don't think so. I would suggest, in the interest of expediency, that the United States Attorney simplify his questions as much as possible in the language of this witness.

Mr. MURPHY: Well, I submit the question is very simple: Is he, and has he ever been, a member of the Communist Party.

I don't know how you can put it any simpler, Mr. Brown.

Mr. BROWN: I wasn't talking about that.

Mr. MURPHY: Well, that is the question that is up right now.

Mr. BROWN: The objection I made to that was that he answered it previously, and his answer stands now.

The COURT: I will take the answer.

A. I ain't going to answer nothing about the law.

By Mr. MURPHY (continuing):

Q. Pardon?

A. I am going to answer nothing about the law, because I don't know much about the law.

Q. I am not asking anything about the law, I am asking you if you ever were a member of the Communist Party.

Mr. BROWN: I submit, if the Court please, that this is objectionable for the following reasons: That the witness does not have to answer it in view of the fact that the McCarran-Wood Act is now the law of the land, and that under its provisions this man who is being charged with deportation in another proceeding, if he answers it, will be eligible for deportation.

46 Prior to the passage of the Act, he, in a deportation proceeding, could have admitted it and raised a Constitutional question as to whether or not membership alone would be sufficient to deport him. And, now, to ask him the question which, by virtue of the McCarran-Wood Act, would incriminate him, is certainly a violation of any Constitutional right that he may have.

The Court: After all, it is within his province to invoke his Constitutional right in that respect.

Mr. BROWN: That is right.

The COURT: And you can't invoke it for him.

Mr. BROWN: He has already invoked it.

The COURT: He qualified his answer by the subsequent statement that he had not, to his knowledge, been involved in any violation of any law, so what reason does he—what would incriminate him?

On cross-examination, he has made the statement that he has not been involved in any violation of law.

Mr. BROWN: Well, this, your Honor: If he says, "Yes, I was a member of the Communist Party at one time," that one question is sufficient to incriminate him now in this proceeding or in another proceeding which is now pending against him for deportation.

Mr. MURPHY: The Supreme Court has held in a deportation proceeding it is not a matter of incrimination. That is a civil proceeding. Certainly this man is seeking to invoke the aid of this Court in obtaining his liberty. And, one of the bases of making him deportable is the fact that he may or may not have been a Communist. And, as said in the Potash case, the probability of deportability is

one of the things that may be taken into consideration in determining whether or not the man shall be admitted to bail.

Now, he is the man that wants bail, and he is charged with being a Communist. If he wants to say he isn't a Communist, that is one question. I submit it is up to him to say it.

Mr. BROWN: Does the United States Attorney take the position that just because he has been a Communist at one time, that he, therefore, should not be given bail now? Is that your position?

47 Mr. MURPHY: What I am saying is that that is a ground of making him deportable.

The COURT: Go ahead.

Mr. BROWN: But this is not a deportation proceeding, your Honor.

The COURT: I know it is not.

Mr. MURPHY: That is one of the considerations the Court can take in mind.

The COURT: Go ahead and take the answer.

Mr. MURPHY: Read the question, please.

The REPORTER (Reading):

"Q. I am not asking you anything about the law. I am asking you if you ever were a member of the Communist Party?"

A. I can't answer that question.

By Mr. MURPHY (continuing):

Q. You can't answer that question. All right, I will ask you, Mr. Zydok, whether you are a member of the Communist Party?

Mr. BROWN: Objection.

The COURT: The objection is overruled. Go ahead.

A. I can't answer that question.

By Mr. MURPHY (continuing):

Q. You can't answer that question. Why?
A. I don't want to incriminate myself.
Q. You say your name is John Zydok?
A. That is right.
Q. Did you ever use the name of "John Son"?
A. I did.
Q. When did you use the name of John Son?

The COURT: Is that two names?

Mr. MURPHY: That is two names, John Son.

A. I forgot when I started. Some time in Detroit.

By Mr. MURPHY (continuing):

Q. Some time in Detroit?

A. When I came to Detroit.

Q. And when did you change back to the name of "John Zydok"?

A. Always I use my right name, but just call me, still me, my parents, my people's son.

Q. They just call you "Son"? And who calls you "Son"?

48 A. All my people who knows me.

Q. That is your Communist Party name, isn't it, "John Son"?

Mr. BROWN: I object to that as being an improper question.

The COURT: I will take the answer.

(No response.)

Mr. BROWN: I object on the further ground the question is ambiguous in that the question, as framed, says, "That is your Communist Party name."

The COURT: Well, it is the form of the question. Do you want to re-phrase it?

Mr. MURPHY: Yes.

By Mr. MURPHY (continuing):

Q. Is "John Son" the name by which you are known in the Communist Party?

Mr. BROWN: I object to that question, if the Court please, on the ground he has already refused to answer as to whether or not he ever was a Communist, on the ground it is self-incrimination, and that the United States Attorney by this means is, by indirection, trying to get in the same answer so that if an answer is given it will be an answer to a question which is objectionable on the ground of self-incrimination.

The COURT: I don't think so.

Mr. MURPHY: There is the man——

The COURT (Interposing): Go ahead. The question is proper. We probably all have names in the Communist Party, or will have before we are through.

Mr. MURPHY: Read the question back, Mr. Reporter.

(The last question was thereupon read by the reporter.)

A. No. Just people who knows, my customers, and everybody calls me "Son".

By Mr. MURPHY (continuing):

Q. Did you ever register in the Communist Party under the name of "John Son"?

Mr. BROWN: I object to that for the same reasons previously stated, that the United States Attorney is trying to get into the record by indirection what is definitely objectionable on the ground of self-incrimination.

49 The COURT: I seem to recall in your direct examination you asked certain questions that established this person as a person of good character. Now he has admitted the use of an alias, and I think Mr. Murphy most certainly has a right to inquire into the use of an alias on the part of this person, and what his object might be in using an alias.

Mr. BROWN: I didn't raise the question when he asked about the alias. I objected to the question when he asked about using that alias in the Communist Party, and, if he answers "yes", then he is not being protected by his Constitutional safeguards, and the United States Attorney is still trying to get into the record by indirection what he cannot definitely get in by direction.

Mr. MURPHY: I submit, I think this is the man that invokes his Constitutional rights, not you, Mr. Brown.

The COURT: I will take the answer.

Mr. MURPHY: Read the question to him, please.

The REPORTER (Reading):

"Q. Did you ever register in the Communist Party under the name of 'John Son'?"

A. I used to use my name "Son" just because my name "Zydok" not really my name. My name in Russia I can't read in English, write in English.

Mr. MURPHY: Will you read the question back to him, please?

(The last question was thereupon read by the reporter.)

A. No.

Q. You never did that; is that right?

A. That is right.

Q. Did you ever fill out an application form for membership in the Communist Party?

Mr. BROWN: I object to that for the same reasons stated before.

The COURT: The objection is overruled.

A. I can't answer nothing about Communist Party.

By Mr. MURPHY, continuing:

Q. Why?

A. I don't want to incriminate myself.

50 Q. You are familiar with the recent trial of certain members of the Communist Party in the City of New York?

A. I don't get your question.

Q. Do you know that 12 members of the Communist Party were tried in the District Court of New York recently?

The COURT: Was it 12 or 11?

Mr. MURPHY: 11 or 12. I was under the understanding it was 12.

A. I don't know much about that.

By Mr. MURPHY (continuing):

Q. Do you know anything about it?
A. I answered that. I don't know much about them.
Q. Do you know anything about it?
A. I heard; I read.
Q. You heard there was such a trial; is that right? Now, did you ever collect money to assist those people in their defense?

Mr. BROWN: I object to that question as being improper and immaterial. It is no crime or reflection on his character if he did collect money. The answer would not be material in helping the Court make its decision. I submit it is highly improper.

The COURT: I will take the answer. You brought out the fact, as I recall, he did sell War Bonds in the Second World War, and if he was engaged in the other type of activity it might be construed as a patriotic activity, it might be construed as an un-patriotic activity, or it might be construed as just an every-day activity of any law-abiding citizen, but that does not preclude Mr. Murphy from the right to inquire into it.

By Mr. MURPHY (continuing):

Q. Will you answer that question?
A. Repeat the question.

Mr. MURPHY: Will you read the question.

(The last question was thereupon read by the reporter.)

A. I don't think so.

By Mr. MURPHY (continuing):

Q. You don't think you did. Do you mean by that that you didn't?

(No response.)

51 Q. You mean you didn't collect any money for those?
A. I don't think so.
Q. Pardon?
A. I don't think so.

Q. You don't think that you did. Now, Mr. Zydok, you have testified before the Immigration and Naturalization Service, did you not, before Mr. Williams of that Service on May 25, 1949?

A. I did.

Q. Did you?

A. I did.

Q. I will ask you if you were asked this question and you made this answer:

"Q. When is the last time you attended a meeting of the Hamtramck Section of the Communist Party?

"A. In February——"

Mr. BROWN (Interposing): I object to that answer being read for the following reasons, and I object to this line of questioning from that transcript for the following reasons:

At the time that this hearing took place it was a hearing on a deportation warrant in 1949 prior to the passage of the McCarran-Wood Act. It was made at a time when it was not a crime to be a member of the Communist Party.

Since that time the law has changed. There is a strong Constitutional question as to whether or not that portion of the law, which makes membership in the Communist Party prior to the passage of the Act—whether that is good, or whether or not it is a Bill of Attainder and, therefore, bad. The United States Attorney is reading from a record which precedes the passage of that Act——

The COURT (Interposing): Which Act?

Mr. BROWN: The McCarran Act, the Internal Security Act of 1950. (Continuing with statement): —under circumstances which were entirely different than exist today. And for that reason, what was at one time not criminal, has today been made criminal and, therefore, it is not proper for the United States Attorney to bring into the record any admissions which this man voluntarily made in another proceeding to try to incriminate him in this proceeding.

Mr. MURPHY: I am simply trying to test this man's credibility. If he made a statement in 1949 to one effect, and makes one
52 today to another effect, certainly it may be incriminating but he is the man that is doing it.

Mr. BROWN: If the Court please, if you were to not place a limit upon what may be admitted in a hearing on a Writ of Habeas Corpus and not place reasonable restraints upon what kind of testimony may be admitted, what you would be doing, in effect, is this: You would be trying this man in this court for having at one time admitted he was a member of the Communist Party in a deportation hearing, and because he did admit that you are going to say, "Now, I am not going to admit you to bail, you are an unsavory character, you are dangerous to the welfare and safety of the United States."

That is what you would, in effect, be saying.

I submit, assuming everything the United States Attorney brings out is correct and true, that he did admit before the Immigration Department in 1949 that he was, that still would not make him ineligible for bail, because every one of these bail cases were cases of Communists and alleged Communists, and even in the deportation proceeding itself, the question is, "Is he a Communist," and, "Is he, as such, eligible to be deported."

Under the McCarran-Wood Act the answer is "Yes."

But, even if he were eligible for deportation, this Court would still have the right to grant or deny bail, and even if he did admit at one time he was a Communist is not material.

Going into the other question——

Mr. MURPHY (Interposing): Whether or not he is a menace or danger to the safety and security of the United States is very important.

Mr. BROWN: Going into the question of whether or not he will be available when the deportation hearing is had is very important.

Mr. MURPHY: Here is a man with reference to whom they say the Attorney-General abused his discretion in demanding bail, and I submit on the basis of this record, from what this man has said so far, regardless of whether he is a Communist or isn't a Communist, that the man was not telling the truth, and certainly we have got the right to determine that. And one of the ways of doing it is by seeing what he said a year ago and what he is saying today.

53 Mr. BROWN: A year ago, if the Court please, he may have admitted in the deportation hearing he was a Communist; 6 months ago he may have admitted in the deportation hearing he was a Communist; in the new hearing he may have admitted he was a Communist.

Despite those admissions, the Attorney-General still admitted him to bail on his own discretion. What change has there been, except the passage of the McCarran-Wood Law, what change has there been, except his conduct, which should not admit him to bail?

Mr. MURPHY: I will tell you one thing that has changed, and that is that the man has perjured himself on the stand. That is one thing.

The COURT: I will take the answer.

By Mr. MURPHY (continuing):

Q. I will ask you again if you were asked this question and made this answer:

"Q. When is the last time that you attended a meeting of the Hamtramck Section of the Communist Party?

"A. In February or March, something like that. After that, no meetings because somebody out of Hamtramck, somebody work."

Do you remember being asked that question and making that answer?

A. I don't answer nothing about Communist Party.

Q. You answer nothing about Communist Party. I am not asking you about the Communist Party; I am asking you if you were asked that question and whether you made that answer on May 25, 1949, before the Immigration and Naturalization Service.

Mr. BROWN: If the Court please, I submit that this line of questioning is not proper, not correct, for the following reasons: He has not denied that he is a member of the Communist Party. He has refused to answer whether he was at one time a member of the Communist Party for the reasons that have been discussed here. And, not having denied it, the question of credibility cannot arise.

Mr. MURPHY: He has denied he collected any funds for the Communists in New York, for their trial, and I propose to show
54 that he did, and that he admitted he collected them, and it certainly goes to his credibility as a witness here.

The COURT: Go ahead.

By Mr. MURPHY (continuing):

Q. Do you recall being asked that question and making that answer?

Mr. BROWN: I also submit, if the Court please, another objection, namely, that the purported transcript of the record from which the Attorney-General is cross-examining and trying to impeach the witness was taken at a time prior to the passage of the—prior to the determination in the United States Supreme Court of the case which held that all deportation hearings held in violation of the Administrative Procedures Act were unlawfully held, and required the Immigration Department and Naturalization Service to start all over again and re-try their cases.

Therefore, any testimony that was had during that time under a void procedure, to which objection was made by myself as Mr. Zydok's attorney, is improper and not a proper subject for impeachment.

Mr. MURPHY: The question is whether or not this man made those statements, I submit, your Honor; not as to whether or not the hearing was valid or what it was.

The COURT: I will take the answer.

By Mr. MURPHY (continuing):

Q. Will you answer that question, please?

A. What question was it?

Q. I will re-read it. This is the question. I am asking you

whether you remember whether this was asked of you and whether you made this answer:

"Q. When is the last time that you attended a meeting of the Hamtramck Section of the Communist Party?

"A. In February or March, something like that. After that, no meetings because somebody of out Hamtramck, somebody work."

Now, do you recall being asked that question and making that answer?

A. So it was making answer, no?

Q. Pardon?

A. So it was making answer, no?

Q. Did you make that answer?

55 A. I don't get what is what.

The COURT: What was the answer?

Mr. MURPHY: "I don't get what is what."

By Mr. MURPHY (continuing):

Q. Do you recall being asked that question that I read to you and making the answer that I read to you?

A. I don't remember what kind of questioning was asked.

Q. You don't remember the question and you don't remember the answer; is that it?

A. That is right.

Q. All right. Do you recall being asked this question:

"Q. Was this meeting held at the Yemans Hall?

"A. Yes."

Do you recall being asked that and making that answer.

A. I don't understand what you mean.

Q. I will ask you if you recall this: Do you recall whether, on May 25, 1949, before the Immigration and Naturalization Service, at a hearing there, you were asked:

"Q. Was this meeting held at the Yemans Hall?"

Do you remember anybody asking you that?

A. I don't.

Q. You don't?

A. I don't.

Q. Do you recall whether or not you answered that question if such a question was asked?

A. If I didn't remember it was asked, how can I remember——

Q. (Interposing:) You don't remember how you answered it if a question like that was asked; is that right?

A. I don't remember.
Q. Do you remember this question being asked of you:

"Q. Have all of your meetings being held in Yemans Hall in Hamtramck?"

Do you remember that question being asked?
A. No. There was a hundred questions. I don't remember now.
Q. You don't remember the questions?
A. No.
56 Q. And, if you don't remember, you don't recall that you answered "Yes"?
A. Maybe. I don't know.
Q. Maybe you did and maybe you didn't; is that right?

(No response.)

Q. Do you recall being asked this question:

"Q. What was discussed at the last meeting of the Hamtramck Section that you attended?"

Do you remember being asked that?
A. No.
Q. Pardon?
A. I don't remember.
Q. You don't remember that. Do you recall whether you made this answer:

"A. We just discussed about that case in New York of the 12 Communists and we discussed the Chinese situation and then to collect money to help that case in New York, that's all we discussed."

Do you recall telling the Immigration Inspector that?
A. I don't remember.
Q. You don't remember?
A. I don't remember no questions.
Q. Do you remember being asked this question:

"Q. Who told you to collect money for this case in New York"?

Do you recall being asked that?
A. I don't remember.
Q. Do you recall making this answer:

"A. The District Committee."

A. I don't remember.
Q. You don't remember that?

A. I don't remember.
Q. Then the question:

"Q. By letter?"

And the answer:

"A. No, personally."

57 Do you recall either that question or that answer?
A. I don't remember any such questions.
Q. Do you recall this question:

"Q. A man from the District Headquarters came to your meeting?
"A. No, just a letter."

Do you recall being asked that question and making that answer?
A. I don't remember any such questions.
Q. You don't remember?
A. No.

Q. Do you remember this question?

"Q. Who was that letter from?"

A. I don't remember.
Q. You don't remember that. Do you recall making this answer:

"A. I think it was from New York to our office here and they sent it to us in Hamtramck."

Do you remember making that answer?
A. No, I don't.
Q. You didn't make that answer?
A. I don't remember.
Q. Pardon?
A. I don't remember.
Q. You don't remember making that answer. And, if you did make that answer, would it be true?
A. I don't remember whether I did or not.
Q. If you did, would that be a true statement?

Mr. BROWN: I object to that as being an improper question. It is an improper question.
The COURT: He says he doesn't remember if he made the answer, if I remember correctly.
Mr. BROWN: Yes, but the question is——
Mr. MURPHY (Interposing): I will withdraw the question.
The COURT: All right.

By Mr. MURPHY (continuing):

Q. Following that question, following that answer, do you recall whether or not this question was asked of you:

58 "Q. You mean the letter was from the Communist Party Headquarters in New York?"

Do you recall being asked that question?
A. I don't remember.
Q. And do you recall making this answer:

"A. That's right, it was from New York."

Do you recall making that answer?
A. I don't remember.
Q. Pardon?
A. I don't remember.
Q. (Reading):

"Q. How many persons usually attend the meetings of the Hamtramck Section?"

Do you recall being asked that question?
A. I don't remember that.
Q. You don't remember that. Do you recall making this answer:

"A. That's a Party Secret. I think it better I'm not going to mention how many and their names and I don't want to be a stool pigeon on the Party."

Do you recall making that answer?
A. I don't remember about those questions.
Q. Pardon?
A. I don't recall about those questions.
Q. You don't remember those. I will ask you now, then, whether after hearing those questions and those answers that I have read to you, whether or not it helps your memory any so that you could tell us now whether you collected any money to assist the Communist trial in New York?

The COURT: To assist in the defense of the Communists——
Mr. MURPHY (Interposing): To assist in the defense of the Communist trial.
The COURT: On trial, you mean?
Mr. MURPHY: Communists on trial at New York.

A. I think no.

59 By Mr. MURPHY, continuing:

Q. Pardon?
A. I think no.
Q. You say that you did not?
Mr. BROWN: He didn't say that. He says he thinks no.

By Mr. MURPHY, continuing:

Q. What do you mean, you think no?
A. I know some money was collected—not exactly where the money goes, so I don't know whether I collect or not such a money.
Q. You say you did collect some money? Is that what you say?
A. Yes.
Q. And what did you collect the money for?
A. I forget for what? That was a long time ago.
Q. Why were you out collecting money?
The WITNESS: What the question was?

(The last question was thereupon read by the reporter.)

A. How can I answer how if I forget? Maybe I collect someone, sometime. I forget which, and why, and when.
Q. You mean you make a practice of collecting money?
A. I didn't get your question.
Q. Do you engage in the collection of money generally?
A. What does than mean, "engage"?
Q. Do you do it? Do you go out and collect money? Is that your business?
A. My business to work in restaurant. That is my business.
Q. You say that you collected money. I gathered that you are regularly collecting money. Now, is that true?
A. I am true I was collecting money, but I don't remember when and for what.
Q. You say you did collect some money. And when did you collect money?
A. I can't tell you no dates.
Q. What do you mean, you can't tell me any dates?
A. I got no kind of paper with me in order to——.
Q. (Interposing): Was it a year ago?
A. Maybe a year, maybe five, maybe ten. I don't know.
Q. You don't know when it was?
A. When it was.
Q. One year, five years or ten years.
60 A. That is right.
Q. Would it be twenty years?
A. Maybe.
Q. Pardon?

A. Maybe.
Q. Maybe. And who did you collect the money from?
A. How can I answer who if I say I forgot maybe I collect or not?
Q. You are the fellow that collected it.
A. I don't want to make the statement because I don't get no answers. I was collecting sometime for funerals, sometimes for someone sick, or something.
Q. So, you collected money on more than one occasion; is that right?
A. That is right.
Q. Many times, is that right?
A. Many times, yes.
Q. But you say it has only been for funerals?
A. I was collecting money for when I was sell the Bonds. Somebody pay $5.00, $10.00, $15.00, and so forth.
Q. What did you do with that money?

The COURT: What was the money?
Mr. MURPHY: Bonds.

A. Buy Bonds, the people.
Q. You turned that money over to whom?
A. Over to where I buy the Bonds.
Q. Well, who?
A. One time it was on WJBK Radio Station, and sometime in the bank.
Q. I see. So that when you collected money for Bonds, you either turned it over to the radio station or over to a bank; is that right?
A. Yes.
Q. And you got Bonds?
A. That is right.

The COURT: Which bank did he give it to?

By Mr. MURPHY, continuing:

Q. What bank did you give it to?
A. The Bank of Hamtramck. I forgot how you call.
Q. That was in 1941, I believe; is that right? Or when was that?
61 A. I don't know about the dates.
Q. Well, how can I tell how long ago if I can't tell the dates?
Q. You have no recollection? A year, two years, ten years?
A. If I go home and get some kind of note.
Q. You have no idea now?
A. No idea.

Q. You haven't any idea. How many Bonds have you sold since 1945?

A. I sold all around $50,000. I don't know which days, since when until when.

Q. Well, since the war ended in Europe and in Japan, how many Bonds have you sold?

A. I sold—I don't know when, the dates.

Q. Was it before or after the end of the war in 1945?

A. I don't know the dates.

Q. Do you know whether it was before the end of the war? Before or after?

A. It was during the war, I think so.

Q. During the war. Since then, you haven't sold any?

A. No. Maybe—I don't know.

Q. Have you sold any since we become engaged in fighting in Korea?

A. I don't remember when I did.

Q. You don't remember when. Getting back to the collection of this money, you say you collected, now, for the Bonds and you turned that money over to the bank and to the radio station; and, the funeral money, who did you turn that over to?

A. To the people who was charging the funeral.

Q. I see.

The COURT: I believe I have to take a jury return, Mr. Murphy. Will you excuse us for just a few minutes? We will take a ten-minute recess.

(A recess was thereupon taken.)

The COURT: It is five minutes after four now. We can adjourn this case now, if you want, in view of the fact the other case I had set for tomorrow is settled.

Mr. BROWN: I would rather adjourn until tomorrow.

The COURT: How about you, Mr. Murphy? Is that all right?

62 Mr. MURPHY: That is agreeable.

The COURT: We will recess this matter until tomorrow morning at nine-thirty; that is, the hearing on the Writ.

Mr. BROWN: Nine-thirty.

(An adjournment was thereupon taken until 9:30 o'clock A. M., Wednesday, November 8, 1950.)

Detroit, Michigan,
Wednesday, November 8, 1950
9:30 o'clock A. M.

(The hearing was resumed pursuant to the adjournment.)

ZYDOCK, JOHN, the Petitioner herein, thereupon resumed the stand as a witness in his own behalf, and having been previously duly sworn, testified further as follows:

CROSS-EXAMINATION (continued).

By Mr. MURPHY:

Q. Since court adjourned, Mr. Zydock, have you had any further opportunity to refresh your recollection as to whether or not you collected any money for the defense of the 11 or 12 Communists on trial in New York City?

A. No.

Q. You haven't thought any more about it?

(No response.)

Q. Have you attempted to refresh your recollection on that point?

A. No.

Q. You haven't. You haven't thought about it, then, since we left here last evening; is that right?

A. That is right.

Q. Well, I will ask you now, then Mr. Zydok, whether you did collect any money for the defense of the 12 or 11 Communists on trial in New York City?

A. No.

Q. You did not. Now, I will ask you whether you recall being asked this question and making this answer on May 25, 1949,
63 before the Immigration and Naturalization Service:

"Q. What office do you hold in the Communist Party of Michigan at the present time?"

Do you recall being asked that question?

A. I don't remember.

Q. (Reading):

"A. Financial Secretary in the Hamtramck Section."

Do you recall whether or not you made that answer?

A. I don't remember.

Q. Do you recall whether or not you ever told that to anyone?

A. I don't remember.

Q. Did you ever tell anybody that you were the Financial Secretary of the Hamtramck Section of the Communist Party of Michigan?

A. I don't remember.

Q. You don't remember ever telling anybody that; is that right?

A. That is right.

Q. Do you recall being asked this question:

"Q. How long have you been the Financial Secretary?"

Do you recall being asked that question?

A. I don't remember.

Q. (Reading):

"A. For just this year."

Do you recall making that answer?

A. I don't remember.

Q. And did you ever tell anyone that you had been Financial Secretary for just that part of the year?

A. I don't remember.

Q. I will ask you whether you recall whether you were asked this question:

"Q. When were you elected?"

Do you recall being asked that?

64 A. I don't remember.

Q. (Reading):

"A. In January, just after the first of the year."

Do you recall making that answer?

A. I don't remember.

Q. Did you ever tell anyone that you had been elected in January of 1949 to the office of Financial Secretary for the Hamtramck Section of the Communist Party?

A. I don't remember.

Q. Do you recall whether or not you were asked this question:

"Q. What other funds do you collect besides the dues?"

Do you recall whether or not you were asked that question?

A. I don't remember.

Q. (Reading):

"A. No kind of funds. I collected for the trial of the 12 Communists in the New York case."

Do you recall making that answer?

A. I don't remember.

Q. Is it possible that you did make that answer?

A. No, because I don't remember.

Q. Is it possible that you told a Hearing Examiner of the Immigration and Naturalization Service:

"I collected for the trial of the 12 Communists in the New York case"?

A. I don't remember.

Q. Well, I am not asking you whether you remember it. I am asking you whether it is possible that you told them that?

A. I can't tell if it is possible.

Q. Pardon?

A. I can't tell if it is possible.

Q. You can't tell whether it is possible? Why can't you tell?

(No response.)

65 Mr. BROWN: I submit, if the Court please, that that question is argument with the witness.

The COURT: I will sustain the objection.

By Mr. MURPHY, continuing:

Q. I will ask you if you recall whether this question was asked of you:

"Q. How much money did you collect for this purpose?"

Do you recall being asked that answer?

A. I don't remember.

Q. You don't remember. And, is it possible that you might have made that answer?

The COURT: You mean "asked that question."

By Mr. MURPHY, continuing:

Q. Or that you might have been asked that question?

A. I don't remember.

Q. You don't remember anything about it. I will ask you if you made this answer:

"A. Something over $100."

Do you recall making that answer?

A. I don't remember.

Q. You don't remember?

A. I don't remember.

Q. And, when you say you don't remember, do you mean by that that it is possible you did make that answer?

A. Well, I am not—if I don't remember, I can't tell possible or not.

Q. You say you don't remember. And, by that do you mean to say that you did not collect $100?

Mr. BROWN: I object to the form of that question as being improper.

The COURT: What is improper about it, Mr. Brown?

Mr. BROWN: He said he doesn't remember, and the question was asked, "By that do you mean it is possible that you did not collect $100."

The COURT: He certainly has a right to continue his cross-examination in an effort to ascertain just what the witness does mean by his answer. Possibly he is trying to refresh his recollection.

Mr. MURPHY: Will you read my last question, Mr. Buckley?

66 (The last question was thereupon read by the reporter.)

A. I didn't say I didn't collect. I say I don't remember.

By Mr. MURPHY, continuing:

Q. You say that you did not say that you didn't collect $100; is that right?

A. That is right.

The COURT: He said, "I didn't say that I didn't collect $100, but I said I don't remember."

That is what I think the full import of his answer was.

By Mr. MURPHY, continuing:

Q. Well, to assist myself in clearing that up, do you mean, then, that it is possible or that you may have collected $100 for this trial in New York?

A. If I don't remember, how can I answer?

Q. What is it you don't remember, whether you made these answers or whether you collected the money?

A. I don't remember collecting the money or nothing.

Q. You don't remember collecting any money?

A. No.

Q. And you don't remember making these answers?

A. I don't remember.

Q. Now, I will ask you, Mr. Zydok, that if you did make the answers to the questions that I have asked you, were they true or false?

A. Well, I don't remember I answered or not.

Q. You mean you don't remember whether they are true or false; is that what you mean?

A. I said I didn't remember I answered those questions or not.

Q. Well, I am asking you that if they were made by you, if the answers were made by you, were they true or were they false?

Mr. BROWN: I submit, if the Court please, that question is objectionable on the ground it is speculative. He has already testified he does not remember making the answers, or the questions being asked. Now, the next question asked after that by the United States Attorney is improper for impeachment purposes.

The COURT: He has said this, Mr. Brown, that he does not remember whether he was asked those questions and made those answers. Now, he hasn't said that he did not make them. So Mr. Murphy, I think, has a right to presume that he either made
67 them or did not make them, by his answer. He isn't definite in his answer, so, if he isn't definite in his answer, Mr. Murphy, acting under the provisions of proper cross examination, has a right to try and develop just what the man does mean by his answers.

Mr. BROWN: Yes. But, if the Court please, the United States Attorney is asking this question: After he says he doesn't remember, the United States Attorney then asks him this question, "By that do you mean that you did collect or did not collect?"

The COURT: Yes; because the witness has said that he does not remember whether he did it or not. That is his answer. Mr. Murphy has a right to interpret that answer as that he may have been asked these questions.

Mr. BROWN: Without trying to argue to the Court, I think that the proper way of doing it, if I may suggest it, is this:——

The COURT (Interposing): All right.

Mr. BROWN (Continuing): —"Do you now remember whether or not you did collect?" And, if that differs from the testimony——

The COURT (Interposing): He has asked that question and got his answer to it. He doesn't remember whether he did or didn't.

Mr. MURPHY: It is a very simple matter, it seems to me, for this man to know whether or not he was telling the truth when he testified before a Hearing Examiner, and that is all I am asking him.

Will you read the last question, Mr. Buckley?

The Reporter (Reading):

"Q. Well I am asking you that if they were made by you, if the answers were made by you, were they true or were they false?"

A. If I don't remember, I can't answer, because it might be true and it might be lies.

By Mr. MURPHY, continuing:

Q. It might be true or it might be false; is that right?

A. That is right.

Q. Now, following that out, then, Mr. Zydok, is it your practice to tell untruths?

68 A. Not in court.

Q. Not in court. You mean not in here you wouldn't falsify your testimony. Would you falsify or tell untruths somewhere else?

A. Well, I don't remember.

Q. I am not asking you whether you remember. I am asking you whether you would falsify testimony in a place other than a courtroom?

A. Well, everybody I meet on the street I don't have to say all the time the whole truth.

Q. Were you on the street when you testified before a Hearing Examiner of the Immigration and Naturalization Service?

A. Where the hearing was, I don't remember.

Q. I am not asking you whether you remember. I am asking you whether it was on the street.

A. I don't get your question.

Q. You said you might tell an untruth or you might not have to tell everything to somebody that you met on the street. Isn't that what you said before?

A. That is right.

Q. All right. Now, I am asking you if your examination before the Immigration and Naturalization Service was on the street?

A. No.

Q. It wasn't. Then, I will ask you again, would you tell the truth there or would you falsify your testimony there?

A. Well, I don't remember.

Q. What do you mean, you don't remember? I am asking you what you would have done. Would you tell the truth or wouldn't you tell the truth?

A. That is what I mean, I don't remember——

Q. (Interposing): You mean you don't know whether you told the truth or whether you told a falsehood; is that what you mean?

A. To answer that question I should remember all the questions and answers, but I don't remember them and I don't remember how to answer them.

Q. Do you have to know the questions and answers before you know what your practice is as to truth and veracity?

69 A. I practice to answer truth.

Q. Pardon?

A. I practice to answer truth.

Q. You practice to answer truth; is that right?

A. That is right.

Q. So that if you testified to certain facts before the Immigration Service, that was the truth you were telling; is that right?

A. I don't remember whether it was.

Q. You mean you don't remember whether you told the truth?

A. I don't remember.

Q. And it is possible, then, that you falsified; is that right?

A. I can't tell. I don't remember.

Q. Well, I am asking you. What is your practice, to tell the truth or to falsify?

Mr. BROWN: If the Court please, he is arguing with the witness. He has already testified his practice is to tell the truth.

Mr. MURPHY: But he qualifies it by saying he doesn't remember.

Mr. BROWN: He says he doesn't remember what the questions were and what the answers given were.

Mr. MURPHY: I submit that is not what he said. He says he doesn't remember whether he told the truth.

I think, Mr. Brown, it is very clear the witness is just being evasive and is deliberately trying to avoid answering the questions.

The COURT: Well, I will take the answer.

(The last question was thereupon read by the reporter.)

A. I answered it. I practice to answer truths.

Q. You practice to answer the truth. So, then, I will ask you if, when you testified before the Immigration and Naturalization Service, you told the truth?

A. I don't remember those questions and answers.

Q. That isn't what I am asking you. I am asking you whether you told the truth there.

A. How can I answer if I don't remember what it was?

70 Q. Do you again say that it is possible you didn't tell the truth?

A. Well, I don't know.

Q. You don't know. But, it is possible, you say, that you didn't tell the truth?

A. I afraid if I forgot something which they was questioning me and answering, questions which I forgot, maybe I answered not right.

Q. I am not asking you about questions you forgot. I am asking you about questions you answered.

A. If I answer you that question in the way that you ask me, it would be true and maybe it is not.

Q. What do you mean, it may be true and it may not be true?

A. Because I told you maybe the question was forget in trying to answer, and did answer it, and maybe it wasn't right.

Q. Now, Mr. Zydok, you are the man that knows, are you not, whether you told the truth or whether you didn't tell the truth; isn't that right?

A. I answer that, but I don't know how to answer that.

Q. In other words, aren't you the man that knows whether you told the truth or whether you didn't tell the truth? Is there anything difficult about that?

A. If anybody asks me like that, something I have to answer, which I don't know questions, sometime I can't answer.

Q. I am asking you about yourself. I am asking you whether you know whether you told the truth. Now, you are the person that knows that, aren't you?

A. I forgot all about it.

Q. I am not asking you whether you forgot. You mean you forgot whether you told the truth?

(No response.)

Q. Is that what you mean?

A. I think I answered that question. I don't know. I can't think now how to answer it any other way.

Q. I am just asking you whether you told the truth before the Immigration and Naturalization Service on May 25, 1949.

A. If you force me to answer, and I forget something——

71 Q. (Interposing): I am not asking you to tell me something you forgot. I am asking you to tell me whether you told the truth. You certainly ought to be able to tell me that. You are the person that does know.

A. There was questioning, a couple of hundred questions. How can I remember them, what was the question and what was answered?

Q. I will go back again. Is it your practice to falsify answers before the Immigration Service?

A. No, it isn't.

Q. So, you tell the truth and did tell the truth to the best of your ability?

A. All the questions which I remember, I answered truth.

Q. All the questions, then, that you answered were true questions; is that right?

A. Which I remembered.

Q. What do you mean, which you remembered? If you answered, then you remember.

A. If you force me to remember to answer, maybe I forget something. I have to, but you force me.

Q. I am not forcing you to do anything. I am asking you, if your answered a question before the Immigration Service, was it truthful or was it false?

Mr. BROWN: I submit, if the Court please, he has already answered that question several times. The last time he answered it was very definite that if he answered it was truthful.

Mr. MURPHY: If he didn't forget.

The COURT: I thought he answered all the questions he remembers he answered truthfully.

Mr. BROWN: Yes.

The COURT: I thought that was the answer.

Mr. MURPHY: Then he again qualified it, your Honor, by saying, if he didn't forget.

Mr. BROWN: The testimony would show which questions he forgot and which questions he remembered by those answers he gave.

Mr. MURPHY: I am asking him, Mr. Brown. I submit he has qualified his answer.

72 Mr. BROWN: He hasn't qualified it. He says those answers which he gave were truthful.

Mr. MURPHY: If he remembered. If he remembered.

The COURT: Go ahead, Mr. Murphy.

Q. (By Mr. Murphy, continuing): I will ask you again, Mr. Zydok, whether or not the answers that you made to the Immigration and Naturalization Service, if you answered the questions, were they true or—were your answers true or were they false?

A. I can't find no more words to answer that question.

Q. Don't you know whether your answers were true or false? And, I am speaking now of questions you answered.

(No response.)

Q. Why do you keep looking at Mr. Brown all the time? You were looking at Mr. Brown; you constantly have to look at Mr. Brown every time I ask you a question. Why do you do that?

A. I didn't look at Mr. Brown.

Q. You didn't look at Mr. Brown?

A. No.

Q. I see. All right. You can answer the last question now.

Mr. BROWN: I submit, if the Court please, he is be-laboring the witness. The witness already testified——

The COURT: (Interposing): I have reached a very definite conclusion, Mr. Brown, that this witness is extremely evasive in his answers, extremely so.

Mr. BROWN: He has good reason to, your Honor.

The COURT: He hasn't good reason to be evasive. There is never a good reason to be evasive in any court, and nobody can condone evasiveness in any type of litigation. And, because he is evasive, the examination of him by Mr. Murphy is difficult.

Mr. BROWN: May I have a recess for a couple of minutes? Perhaps the witness——

The COURT: (Interposing): No. I don't think it is necessary to have a recess, because we had a recess from last night, and his tactics today are completely different than they were yesterday.

Today he is a symphony of "I don't remember, I don't remember, I don't remember."

73 Mr. BROWN: I think we can simplify it if you give me a recess, because I think this, your Honor: I think he is quite concerned about the fact that under the passage of the new law—and this point was argued yesterday—that certain admissions he may have made previously before the Immigration Service may now be held against him, and at that time it was not criminal to be a member of the Communist Party. Now it is. And he is quite concerned about that. And I think it is unfair for Mr. Murphy——

The COURT (Interposing): I have no knowledge of the fact that it is criminal now to be a member of the Communist Party.

What is the sponsorship of that statement?

Mr. BROWN: The McCarran-Wood Law.

The COURT: Criminal?

Mr. BROWN: Well, yes.

Mr. MURPHY: Makes it a crime to be under the McCarran-Wood Law?

The COURT: I wasn't conscious of the fact—

Mr. BROWN (Interposing): It makes persons who are members of the Communist Party as of February, 1950, just about criminal.

Mr. MURPHY: What do you mean, "just about"? Is it an offense under that Act to be a Communist, a criminal offense?

The COURT: This is a civil proceeding that we are engaged in here, and it is under the provisions of the Act, so even though your conclusion is that a Communist is a criminal, why, it certainly has no bearing on this particular proceeding because it is a civil proceeding.

Mr. BROWN: But, the issue before this Court is whether or not this man is to be enlarged from bail even if he had admitted——

The COURT (Interposing): The issue here is not whether or not this man should be enlarged from bail. You agree the issue is whether or not the Attorney-General of the United States has abused his discretion.

Mr. BROWN: That is correct. That is the issue. And there are certain factors that are involved to determine whether or not he did abuse his discretion.

74 The COURT: This is one of the factors, however, I would say. If I am to appraise the discretion used by the Attorney-General, I certainly, in my review of that exercise of discretion, I would like to know something about the party that is in the controversy, and that is this subject here, Mr. Zydok.

Mr. BROWN: Well, to show the good faith of myself as an attorney, and Mr. Zydok, I would have no objection whatever to you reading the testimony in that hearing before the Immigration Service.

The COURT: Well, unfortunately, I don't have any right to probe through private papers of either litigant. I can't go down and go through your files and say, "I would like to have that;" or go over to Mr. Murphy's files and say, "I would like to have that."

The only thing I have before me is whatever exhibits are offered in the course of the litigation, and up until now, why, I don't have anything. So, what method the Government intends to pursue, what method you intend to pursue, is a matter that is purely within yourself.

Mr. BROWN: But, here is the situation. He is trying to discredit and impeach the witness. He is trying to do that on testimony he gave before the Immigration Service in deportation proceedings in May, 1949.

The COURT: I don't know. This may be an indirect way of letting me know of certain information that the Attorney-General of the United States had, because I think I can take judicial notice of the fact, I will and do—that the Immigration and Naturalization Service is a branch of the Department of Justice, and I am further empowered to take judicial notice of the fact that the Attorney-General of the United States is head of the Department of Justice.

Now, if this is the type of file that—the type of report that he is using in his interrogation of this witness, then I know it is part of the files and records of the Department of Justice and it must be information that was in the possession of the Attorney-General.

Mr. BROWN: Well, I have no objection to your reading that file; I have no objection to you seeing the transcript of that testimony.

75 The COURT: Let me have it, then.

Mr. BROWN: I haven't got it. The United States Attorney has it. This was an official hearing, open to the public, and in the practice over there the attorneys are given copies of the transcript.

The COURT: Let me have your copy and I will read it.

Mr. BROWN: I don't have it here. I am reasonably sure I have it at the office, and I will be very glad to turn it over to you.

Mr. MURPHY: I might tell the Court, we propose to offer the copy.

The COURT: All right, when it is offered, I will have a chance to read it.

Mr. MURPHY: May we have the last question, Mr. Buckley?

The REPORTER (Reading):

> "Q. I will ask you again, Mr. Zydok, whether or not the answers that you made to the Immigration and Naturalization Service, if you answered the questions, were they true or —where your answers true or were they false?"

A. I did answer which question I am a Communist—I answer the truth. But it was first time for me, and maybe I answer questions which they ask and I am a member, and ask them, that was maybe true and maybe false.

Mr. MURPHY: Now, just a minute. Would you re-read the last part of that answer?

(The last answer was thereupon read by the reporter.)

Q. (By Mr. Murphy, continuing): To follow that out, then—I don't know whether I understood you, Mr. Zydok—but this is the inference, the impression I got, that maybe you told the truth in answering some questions and maybe you told falsehoods; is that right?

A. That is right.

Q. You don't know, then, whether you told the truth?

A. I don't.

Q. Or whether you falsified your testimony; is that correct?

A. I forget; that is why I don't want to answer now which questions I don't remember.

76 — Q. That is why you now don't want to answer any questions you don't remember?

A. That is right.

Q. Well, I will again ask you, is it because you don't remember whether you told the truth before the Hearing Examiner or whether you falsified your testimony and that you now say you don't remember? Is that what you mean?

A. I didn't get that question.

Q. Strike the question. I will ask you this question again, Mr. Zydok:

(Reading):

"From whom did you collect this money, John?"

Do you recall that question being asked?

A. I don't remember.

Q. And do you recall making this answer:

"A. Well, don't expect me to give the names, that I'm not going to do because I'm not going to be a stool pigeon on the Communist Party. From the members of the Communist Party."

Now, did you make that answer?

A. I don't remember.

Q. You don't remember whether you did or whether you did not; is that right?

A. That is right.

Q. I will ask you again, then, whether or not you collected any money from members of the Communist Party for the defense of the 12 Communists in New York?

A. I don't remember collecting.

Q. You don't remember collecting any money; is that right?

A. That is right.

Q. So, then, if you were asked this question and made this answer, the answer I just read to you, to the Hearing Officer, would that be a true or a false answer that you made at that time?

A. I don't remember no questions and answers. Maybe false and maybe true.

Q. It might be false and it might be true; is that right?

A. That is right.

77 Q. And that is just the way you would answer a question?

Mr. BROWN: I submit that that last question is objectionable as being argumentative.

The COURT: I will sustain the objection.

Q. (By Mr. Murphy, continuing):

"Q. To whom did you send this money?"

Do you recall being asked that?

A. I don't remember.

The COURT: When was this hearing, by the way?

Mr. MURPHY: This was in 1949, May 25th.

The COURT: All right, go ahead.

Q. (By Mr. Murphy, continuing):

"Q. To whom did you send this money?

"A. To the office of the Communist Party in Detroit, Michigan, downtown."

Did you make that answer?

A. I don't remember.

Q. (Reading):

"Q. Where is that located?

"A. On Cadillac Square."

Do you recall being asked that question and making that answer?

A. I don't remember.

Q. (Reading):

"Q. Do you know what building?

"A. The Lawyers Building."

Do you recall being asked that question and making that answer?

A. I don't remember.

The COURT: Was that where the Communist Headquarters was, in the Lawyers Building, at that time?

The WITNESS: Is the Judge asking me questions?

The COURT: Yes.

Mr. MURPHY: Yes.

78 A. Now I don't remember.

The COURT: Do you know where you lived at that time, what your street address was?

A. Yes, I do.

The COURT You do? What was your street address?

A. 3445 Evaline.

The COURT Where were you working at that time?

A. Same place as now, Detroit Workmen's Cooperative Restaurant.

The COURT: What is the address of that place?

A. 9234.

The COURT: What street?

A. Joseph Campau.

The COURT: All right.

Q. (By Mr. Murphy, continuing) You say you don't know or don't remember where the Communist Party Headquarters was located?

A. No, I don't remember this time.

Q. You didn't remember it and you don't remember it; is that right?

A. I don't remember.

Q. You don't remember. Do you know whether in May of 1949, whether you knew where the Communist Party Headquarters was?

A. On those dates I forgot when I know and when I don't know.

Q. You forgot when you knew and when you didn't know. Did you ever know where the Communist Party Headquarters was located?

A. Some time I knew.

Q. Some time you knew. And when was that?

A. I can't answer no dates.

Q. Well, what do you mean, you can't answer no dates?

A. Because I don't know.

Q. Well, was it last year?

A. Might be.

Q. It might be last year. And how did it happen that you knew where the Communist Party Headquarters was?

A. I read in the paper. I heard from the people.

Q. You read it in the paper. Is that the only reason you knew?

79 Did you have any other reason to know where the Communist Party was located, other than reading it in the paper?

A. Maybe some other reason. I don't remember.

Q. Pardon?

A. Maybe some other reasons.

Q. What were the other reasons? Did I understand you to say that you read it in the newspaper and that you heard from some other people there?

A. That is right.

Q. Is that what you said?

A. That is right.

Q. And what other people did you hear from?

A. I don't remember, and I don't want to mention somebody's names.

Q. You don't remember and you don't want to mention somebody's name; is that right?

A. Yes.

Q. Is that what you are saying?

A. That is right.

Q. I will ask you, then, Mr. Zydok, did you ever visit the Communist Party Headquarters in the Lawyers Building at any time?

A. I don't remember.

Q. You don't remember. Is it possible that you may have?

A. Maybe it is possible.

Q. Maybe it is possible. I will ask you then, Mr. Zydok, whether, when you were before the Hearing Examiner of the Immigration Service, and after being asked where the office of the Communist Party was located, and after being asked:

"Q. Do you know what building?"

you stated:

"The Lawyers Building."

I believe I have asked you that, and you say you don't recall that, making that answer?

A. I don't get your question.

80 Q. I believe you told me before you don't recall, you didn't recall being asked this question, referring to the Communist Party Headquarters:

"Do you know what building?"

And you made the answer:

"The Lawyers Building."

You say now that you don't recall being asked that question and making that answer?

A. I don't remember.

Q. You don't remember. I will ask you, then, whether you were asked this question:

"Who did you send it to there?"

Do you recall being asked that question?

A. I don't remember.

Q. And making this answer:

"I brought it myself."

Do you recall making that answer?

A. I don't remember.

Q. Well, I will ask you, then, whether or not you ever brought any money to the Communist Party Headquarters in the Lawyers Building yourself?

A. I don't remember.

Q. Pardon?

A. I don't remember.

Q. You don't remember whether you ever brought any money——

A. (Interposing:) No.

Q. (Continuing:) —to the Communist Party Headquarters in the Lawyers Building?

A. I don't remember.

Q. You don't remember; is that right?

A. That is right.

Q. Is it possible that you did?

A. I don't know.

Q. You might have?

A. I don't remember. I can't answer it. If I answer it—

81 Q. (Interposing:) Did you say that you didn't? You know whether you did or you didn't, don't you?

Q. If I don't remember, I don't know.

Q. You mean you just have no memory as to that at all; is that right?

(No response.)

Q. Are you suffering from amnesia?

A. I can't answer that because I don't know what is amnesia.

Q. You don't know what that is. Are you suffering from a loss of memory?

The COURT: He can't because he remembered where he worked, and where he lived, so he can't be suffering from amnesia.

Mr. BROWN: I submit, your Honor please, that this is also argumentative.

The COURT: No, I don't think that is. It might be objectionable on the ground he is asking for a medical conclusion.

Mr. BROWN: Well, he corrected that question.

By Mr. MURPHY (continuing):

Q. You remember well everything other than Communist activity; isn't that correct?

A. Not everything.

Q. Not everything. Well, you remember where you worked; you remember that you sold Bonds; don't you? And, collected money for the purchase of bonds?

A. I don't answer exactly how many I collect, if I remember.

Q. I think you mentioned the figure $50,000.

A. I didn't state exactly "50." Something like that.

Q. Didn't you mention the figure $50,000?

A. No. I say something around 50,000.

Q. Something around 50,000. Now, I am not asking you any figure in connection with monies you might have taken to the Communist Party Headquarters. I am just asking you if you took any money up there at any time.

A. I can't answer it because I don't remember.

Q. You just don't remember anything about that; is that correct?

82 A. That is correct.

Q. Now, you were Financial Secretary of the Hamtramck Section, weren't you, in 1949?

(No response.)

Q. What are you looking over there?

A. Do you want me to hang my head?

Q. I am just asking you why you looked over there.

A. I looked all over the room.

Q. I am just asking you why you looked over there this time when I asked you that question. Can you tell me?

A. Yes, I look all over the room.

Q. I am asking you why you looked over there; I am not asking you why you looked out the window.

A. Well, if I can look on this side, I can look this side.

Q. I am not asking you that. I asked why you looked over there.

A. Just because I turned my head.

Q. Just because you turned your head; is that right?

A. That is right.

Q. No other reason?

A. No other reason.

Q. Now, tell me whether or not you were Financial Secretary of the Hamtramck Section of the Communist Party in 1949?

A. I can't answer that question.

Q. What do you mean, you can't answer it?

A. I don't want to incriminate myself in this new law.

Q. Do you have any memory about it? Do you remember whether you were or whether you weren't?

A. Just I can't answer that question.

Q. Pardon?

A. Just I can't answer that question.

Q. Just you can't answer that question. Your memory doesn't become involved in that at all; is that right? No question of memory there, is there?

A. I can't answer that question.

Q. Why can't you answer it?

A. Because I don't want to incriminate myself——

Q. (Interposing:) Because you don't want to incriminate yourself?

83 A. (Continuing:) —about a member of the Communist Party.

Q. I will ask you if, as Financial Secretary of the Communist Party, you took money in the form of dues to the Communist Party Headquarters in the Lawyers Building?

A. I don't want to answer that question about Communist Party.

Q. Pardon?

A. I don't want to answer that question in order to incriminate myself under that new law.

Q. You don't want to answer any questions concerning the Communist Party; is that right?

A. That is right.

Q. And why?

A. I don't want to incriminate myself.

Q. Because you don't want to incriminate yourself. Has somebody told you that it is a criminal offense to be a Communist?

A. Yes. I read it in the paper and I heard people talk.

Q. You read it in the paper that it is a crime to be a Communist; is that right?

(No response.)

Q. Is that what you read in the paper?

A. I read in the paper that they put in jail and deport them.

Q. Do you consider that that is a criminal offense?

A. I don't understand that question.

Q. You don't understand that. All you are—as I gather, what you have read is that if you are a Communist you can be deported—Communist alien, you can be deported; is that what you mean?

A. That is right.

Q. And you say you read that in the paper, and other people have told you that; is that right?

A. That is right.

Mr. MURPHY: I have no further questions.

REDIRECT EXAMINATION.

By Mr. BROWN:

Q. What are your wages, Mr. Zydok, as head waiter at the restaurant?

84 A. I did not get that.

Q. What were your wages at the restaurant as head waiter?

A. What am I doing in the restaurant?

Q. No. Your wages. How much you earn.

A. $50.

Q. $50 what? A week?

A. A week.

Q. Do you have any other income from anywhere else?

A. No.

The COURT: Is this a non-tipping restaurant?

Mr. BROWN: I don't know.

By Mr. BROWN (continuing):

Q. Is it? Do you get tips as head waiter?

A. No.

Q. As waiter, just what are your duties out there, Mr. Zydok?

A. My duty, waiting on customers, and watch register, and I take charge of all the inside in the restaurant.

Mr. BROWN: I think that is all.

Mr. MURPHY: I have no questions.

The COURT: That is all, Mr. Zydok.

(The witness was thereupon excused.)

COLLOQUY

Mr. BROWN: I sent over to my office for the copy of the transcript, if I have it in the file, of the May 25th hearing. I am not sure whether I have a copy or not. I do have a copy of the transcript of the testimony that was taken in the subsequent hearing in October, 1948.

The COURT: I don't know——

Mr. MURPHY (Interposing): Do you want to use a copy of the May 25th? I will make one available to you.

Mr. BROWN: I told the Court if I had a copy I would be pleased to submit it to him to examine it. We have nothing to conceal in that testimony, or any subsequent proceeding.

Mr. MURPHY: Well, I propose to offer it.

Mr. BROWN: It is not admissible, but I would like to submit it for the Judge's—this is not a deportation case, but there is no intention to conceal any fact.

85 Mr. MURPHY: Well, just stipulate that is a copy and I will make it a part of our case here.

Mr. BROWN: Well, I don't think it is admissible, if the Court please, but I have no objection to the Court reading it. As a matter of fact, I wish the Court would read it.

The COURT: Well, let us mark it as an exhibit, then, and do you want to offer it, Mr. Murphy?

Mr. MURPHY: If there is any question as to its admissibility, I would be glad to put a representative of the Immigration Service on the stand to identify it as being part of their files and records, unless that will be stipulated by Mr. Brown, and it is a record made and kept in the regular and ordinary course of business of the Immigration Service, transcribed and made at or about the time the testimony was given.

The COURT: And that it pertains to this——

Mr. MURPHY (Interposing): The petitioner.

The COURT: The petitioner.

Mr. BROWN: Is that the one where I was present?

Mr. MURPHY: Yes.

Mr. BROWN: That is not the testimony of the proceeding before the Immigration Service.

Mr. MURPHY: Well, I submit that it is. This is a preliminary hearing before Examiner Donald T. Williams.

Mr. BROWN: That was a preliminary hearing that he did not sign. He was without benefit of counsel. I have here the official record of the deportation proceedings.

Mr. MURPHY: You don't contend, Mr. Brown, that that would affect your client's veracity, whether he had the assistance of counsel, do you? That is the only thing we are offering it for.

Mr. BROWN: I thought you were testifying——

Mr. MURPHY (Interposing): I am not testifying to anything. I was reading.

Mr. BROWN: I thought you were cross-examining him on the basis of something that was an official part of the record.

Mr. MURPHY: It is.

Mr. BROWN: Well, I take exception to that statement. It is not.

86 Mr. MURPHY: Well, then, we will put our witness on the stand.

The COURT: All right. Get the record identified.
Mr. MURPHY: Mr. Sureck.

* * * * * *

SURECK, JOSEPH, was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. MURPHY:

The CLERK OF THE COURT: Your name, please?
The WITNESS: Joseph Sureck.
Mr. MURPHY: Mark this, please.

(A transcript of proceedings before the Immigration and Naturalization Service, re John Zydok, dated May 25, 1949, was thereupon marked Government's Exhibit No. 5 by the reporter.)

By Mr. MURPHY:

Q. Will you give us your name, please?
A. Joseph Sureck.
Q. What is your business, Mr. Sureck?
A. I am employed with the Immigration and Naturalization Service in the Department of Justice at Detroit, Michigan.
Q. And in what capacity?
A. My title is "Investigator."
Q. And, as such, are you familiar with the files and records of the Department in the instant case concerning the petitioner, John Zydok?
A. Yes, sir.
Q. Do you have personal knowledge of the contents of that file?
A. Yes, sir.
Q. I will ask you, now, to look at Government's proposed Exhibit No. 5, and ask you whether or not you can identify that
87 as being a record taken from the files of the Department? (Handing exhibit to the witness.)
A. Yes, sir. This is a preliminary statement taken by Investigator Donald T. Williams from John Zydok on May 25, 1949, in connection with an investigation of John Zydok being conducted at that time.
Q. And do you know whether or not that record was made in the regular and ordinary course of business of the Immigration and Naturalization Service?
A. Yes, sir.

Q. And do you know whether or not it was made at or about the date that is reflected on that record, being May 25, 1949?

A. Yes, sir, it was transcribed within one or two weeks after that.

Q. How do you know that?

A. Well, because at that particular time I had supervision over the stenographic help in this particular section that was conducting this type of investigation.

Q. And you say that that records the testimony at a preliminary hearing; is that correct?

A. Yes, sir.

Q. And what do you mean by a "preliminary hearing"?

A. That is a hearing or an interrogation that takes place when an alien is called in for a question and answer sworn statement in connection with an investigation. It is not a deportation hearing.

Mr. MURPHY: I see. I will offer Government's Exhibit No. 5.

The COURT: Does this particular exhibit pertain to this particular petitioner?

A. Yes, sir, I can vouch for that.

The COURT: All right.

Mr. MURPHY: We will make an offer of Government's proposed Exhibit No. 5.

Mr. BROWN: I would like to cross-examine on it, first, if I may, before raising any objection.

Were you present, Mr. Sureck, at the time this preliminary examination was held?

A. I was not present at that interrogation.

88 Mr. BROWN: Do you know whether or not Mr. Zydok signed this transcript?

A. I would have to examine that particular copy.

Mr. BROWN: All right. (Handing exhibit to the witness.)

A. His signature does not appear thereon.

Mr. BROWN: Do you know whether or not he had the benefit of an interpreter?

A. I have a recollection of the day when Mr. Zydok was brought into our office to be interrogated. I have no recollection that an interpreter was present. I might add that if an interpreter was present the record would disclose that. I could examine the record and tell you. (Examining exhibit.)

The transcript does not disclose that an interpreter was present.

Mr. BROWN: When Mr. Zydok was brought in on May 25, 1949, did he come down voluntarily or was he brought in by some members of the Department of Justice, if you recall?

A. I have no personal knowledge as to how he was brought in.

Mr. BROWN: Your only knowledge, then, of this transcript is the

fact that the stenographic department was under your supervision?

A. At that time.

Mr. BROWN: You were not present at this particular examination?

A. I was not present at the interrogation, but I do know that Mr. Zydok, the petitioner, was in our office on or about that particular day and was interrogated by Mr. Williams.

Mr. BROWN: Do you know whether or not Mr. Zydok was informed as to his Constitutional right at that hearing?

A. I have no personal knowledge as to those facts.

Mr. BROWN: Do you know whether or not Mr. Zydok was informed that he had the right to benefit of counsel at that hearing?

A. I do not know.

89 Mr. BROWN: I will object to this transcript on the ground that this witness has not qualified himself to properly identify it. He was not present at the time it was taken. He is not prepared to testify as to—he is unqualified to testify as to the truth and veracity of the question and answers therein stated.

The COURT: The only thing necessary, as I view this particular exhibit, is whether or not this witness can identify that exhibit as a part of the files and records of the Immigration and Naturalization Department, whether or not it is a record that was made and kept in the regular and every-day course of business, and whether or not it is a record made at or about the time of the transaction,—the transaction being the hearing.

Now, that is sufficient, in my opinion, to make that exhibit admissible, because all I am considering the exhibit for is in an effort to ascertain whether or not the Attorney-General of the United States has abused a certain discretion.

Mr. BROWN: Well, I was going into that in just a minute, but first I think this would not be admissible by the identification by this witness. Perhaps the proper way of doing it, of course, is to bring in the stenographer so that she can be cross-examined with respect——

Mr. MURPHY (Interposing): I take exception to Mr. Brown's——

The COURT (Interposing): You have the wrong picture.

Mr. BROWN: Let me make a basic objection to why this is not admissible, if the Court please. The man was brought in for examination. According to the record here, he was not advised of his right; he was not advised that he was entitled to the benefit of counsel; he was not advised that certain things—that anything he would say might be used against him. And now at a later date, a year and a half, approximately a year and a half later, the United States Attorney comes forward and says that because of what he said in 1949 under these conditions, bail should not be granted to him.

Mr. MURPHY: That isn't what I am saying at all. You have said

the Attorney-General has abused his discretion. Now, I
90 am showing that what we have in our file, part of which you have in your hand, in which this man admittedly states he is an active Communist, that he collected funds to finance the Party, that is information that was available to the Attorney-General when he acted under the McCarran Act.

Mr. BROWN: Let me ask you this, Mr. Sureck: When this transcript was completed—I think you said it was completed about a week or ten days after it was taken. That would be the early part of June, 1949; is that correct?

A. That would be about right.

Mr. BROWN: Approximately. And the Attorney-General had the benefit of that transcript, did he not,—the Attorney-General's Office?

A. I can't testify to that.

Mr. BROWN: And it was after this transcript was made that Mr. Zydok was arrested on an order of deportation in October, 1949, was he not?

A. The warrant of arrest was served after that date there.

Mr. BROWN: And it was in October, 1949, that the Attorney-General in his discretion granted $2,000 bail to John Zydok and released him on bail; is that correct?

A. I know that he was released on bail.

Mr. BROWN: And part of the provisions of the bail bond were that he report regularly to the Department of Immigration and Naturalization Service; is that correct?

A. That is my understanding.

Mr. BROWN: And, so far as you know, he did report regularly, Mr. Sureck?

A. I can testify that I have seen Mr. Zydok at our office for the purpose of reporting.

Mr. BROWN: Thank you. And this was after this hearing on May 25, 1949?

A. I am sorry, I didn't get your question.

Mr. BROWN: His reporting and his release on bail was after May 25, 1949?

A. That is correct.

Q. And it was not until the passage of the McCarran-Wood Law, known as the Internal Security Act of 1950, that your office
91 received instructions from the Attorney-General to re-arrest and hold for deportation John Zydok; is that correct?

A. That is correct.

Mr. BROWN: And that order came to you in the form of a radiogram approximately a month after the passage of the Act?

A. I don't have the dates at hand.

Mr. BROWN: Do you know whether or not Mr. Zydok reported to the Department after the passage of the McCarran Act, which I think was about September 23, approximately?

A. I do not know.

Mr. BROWN: At all times up until the time that you received the radiogram, you knew where the Department could lay its hands upon John Zydok, did you not?

A. We had his address that he testified to on the stand.

Mr. BROWN: You know that that was his home?

A. I have no personal knowledge of that.

Mr. BROWN: Mr. Sureck, as investigator for the Department in Detroit, you have access, of course, to the files and records of John Zydok?

A. Yes, sir.

Mr. BROWN: And you know about the contents of the files and records on John Zydok?

A. I am familiar with it.

Mr. BROWN: Is there anything in the files and records which would indicate that John Zydok has committed any transgressions or violated any laws after the passage of the McCarran Act?

Mr. MURPHY: I will object to that question on the grounds it involves the disclosure of information that may be confidential to the Attorney-General.

The COURT: I will sustain the objection.

Mr. BROWN: Do you yourself, Mr. Sureck, know of any reason why Mr. Zydok was ordered to be re-arrested, except for the information contained in your files?

A. He was arrested on orders received from the Attorney-General.

92 Mr. BROWN: And the Attorney-General gave no reason for the executing of those orders?

A. I would have no knowledge of any reasons.

Q. Do your records disclose whether or not the Department informed the Attorney-General as to whether Mr. Zydok violated any provisions of reporting?

A. The files would not disclose that he violated any provisions of the reporting.

Mr. BROWN: Then you would say that he did not violate any provisions of the reporting?

A. I would not know.

Mr. BROWN: Do you happen to know how many copies of the proposed Exhibit 5 were made at the time?

A. I know the usual practice, and that is to make an original and 5 copies.

Mr. BROWN: And is it the practice to send one of the copies to the attention of the Attorney-General at Washington?

A. It would be a practice to submit a copy, along with an application for warrant of arrest that, would go to our office in Washington, D. C. That is the Office of Immigration and Naturalization Service.

Mr. BROWN: And do you know whether or not that practice was followed in this case?

A. I would have to examine the file to ascertain that.

Mr. BROWN: Will you do so? Will you examine the file and tell us that, please?

A. (After examining file): Yes, sir, a copy was sent to our Central Office in Washington, D. C.

Mr. BROWN: Deportation proceedings are now pending, are they not, against John Zydok?

A. Yes, sir.

Mr. BROWN: And they are set for hearing on November 10, 1950; that is, the resumption of the hearing?

A. It is a resumed hearing. A hearing *de novo* was started in September of this year.

Mr. BROWN: That was after the proceedings had been ruled improper by the United States Supreme Court and the Department had to start, re-commence those proceedings.

93 A. The original proceedings in 1949 or 1950 were held to be illegal under the Sung Decision.

Mr. BROWN: Do you know, Mr. Sureck, that these deportation proceedings sometimes take quite some time to complete?

A. I might add that it hasn't taken them long for the Government to complete its case. The cases have been dragged out because the various counsel for respondents have requested adjournments.

Mr. BROWN: Well, for one reason—I wasn't reflecting on the Government's delay, Mr. Sureck. Please forgive me if I gave you that impression; I was not at all. What I was driving at was this, that because of a number of—large number of factors—the fact that the presiding inspector is a non-resident, and the fact transcripts have to be made and briefs filed, and opinions have to be written by the Director of Naturalization, those things take some time, do they not?

A. If an appeal is taken; yes, sir.

Mr. BROWN: Do you know, of your own knowledge, that there are some deportation proceedings pending which have been pending for some years?

A. I have heard of them.

Mr. BROWN: If an appeal were taken in the matter of John Zydok, it is likewise possible that might take some years to be completed, might it not?

A. That is conjectural. I can't answer that, Mr. Brown.

Mr. BROWN: Under the law, if—do you know whether or not Poland is issuing visas to deportees?

A. I have no direct knowledge of that. The only instances I know where applications were made, they were turned down. Whether Poland is turning visas down in every case, I have no knowledge of that.

Mr. BROWN: Do you know of your own personal knowledge, or by review of the file, whether or not there has been any change in the conduct of Mr. Zydok since he was admitted to bail—strike that.

Do you know of any change in the conduct or actions of Mr. Zydok since the passage of the McCarran-Wood Law?

94 Mr. MURPHY: Well, just a minute. I will object to that on the ground it is immaterial.

The COURT: I think I will take the answer. Go ahead. You are talking about his general conduct, I presume, and on the basis of information that this witness has.

Mr. BROWN: Yes, of course.

The COURT: All right.

A. From observation of the respondent or the petitioner on the witness stand today, I would say there has been a continuation of the reasons for which he was originally arrested.

Mr. BROWN: Well, has there been any change in his conduct or action with respect to—has there been any change in the conduct or the actions of the petitioner since the passage of the McCarran-Wood Law?

A. I know of no increased activity on the part of the petitioner.

Mr. BROWN: Have you received any notification from the Attorney-General's Office, or the Attorney-General himself, as to why Mr. Zydok was arrested, except for the passage of the McCarran-Wood Law?

Mr. MURPHY: I submit that question has been asked and answered.

The COURT: It has been. You have asked that before.

Mr. BROWN: That is all.

By Mr. MURPHY, continuing:

Q. You were asked by Mr. Brown, Mr. Sureck, whether you noticed any change in the petitioner's conduct since the passage of this Act. Did I understand your answer to the last question that you said you had not?

A. By "change" I mean I know of no decreased activity on his part as well as increased activity.

Now, my assumption is being made—is based upon knowledge of the fact and admissions made my presence that he is a member of the Communist Party.

Q. And you have had opportunity to observe his conduct in the courtroom since the beginning of this hearing?

A. I have.

Q. And would you say that his conduct here as a witness has changed in any respect since your last contact with him?

95 A. No, sir.

Q. Or has it always been that type?

A. It has not changed. By that I mean he still shows an affinity and leaning toward the Communist Party.

Q. With respect to the deportation hearing that you say was begun in September, why was that not completed at that time?

A. Counsel for the petitioner requested an adjournment in order to secure additional evidence to present.

Q. And that is why the hearing is pending at the present time?

A. That is correct.

Mr. MURPHY: That is all.

Mr. BROWN: Just two questions, Mr. Sureck.

* * * * *

CROSS EXAMINATION.

By Mr. BROWN:

Q. Prior to the passage of the McCarran-Wood Law, Mr. Zydok was very cooperative as a witness, was he not, both at the preliminary hearing in May, 1949, and at the subsequent hearing in 1949?

A. At the subsequent hearings, he did not testify.—No, with draw that statement. He did testify at the hearing that was declared illegal, but at the hearing in September——

The COURT (Interposing): That is a difficult question, I think, for this witness to answer, in view of the testimony of the petitioner himself here today that he himself doesn't remember whether he was cooperative or not because he doesn't remember any of the questions or any of the answers. So, if he himself cannot aid the Court in telling us whether he was cooperative at that time, how can this witness, who has no way of entering the mind of this petitioner, give you any assistance on your question?

Mr. BROWN: Well, Mr. Sureck was present at the previous deportation hearing.

The COURT: Yes; but the subject matter of the entire controversy cannot tell us today whether he was cooperative or not. He

96 has no recollection of the hearing, apparently, or at least he has no recollection, according to his testimony today, of any questions that were asked him or any answers, or whether he told the truth or didn't. So, I don't know how this witness can

substitute his judgment for the judgment of the party that was answering the questions.

Mr. BROWN: It may be that the passage of the McCarran-Wood Law made a substantial change in the——

The COURT (Interposing): You have no right to assume that because, after all, you cannot go into the man's mind here. All we can do is take him from his testimony today and draw conclusions from that. This witness can't substitute his judgment for whether or not this party was cooperative.

Mr. BROWN: Well, if he knows, he can certainly answer, can he not?

Mr. MURPHY: I submit it calls for a conclusion on his part whether he was cooperative.

The COURT: I will sustain the objection.

Mr. MURPHY: You can ask him what he said. There is no objection to that.

By Mr. BROWN, continuing:

Q. At the prior deportation hearing, Mr. Sureck, at which you were present, did Mr. Zydok readily answer questions respecting membership in the Communist Party at that time?

Mr. MURPHY: I will object to that as again calling for a conclusion as to whether or not he readily answered questions.

Mr. BROWN: Mr. Sureck was present. He can testify, if he knows.

Mr. MURPHY: Whether he "readily"? How does he know how he answered questions?

Mr. BROWN: I think Mr. Sureck is qualified to answer that. May I have a ruling of the Court?

Mr. MURPHY: I submit it still calls for a conclusion on his part. Ask him what questions he was asked.

Mr. BROWN: I am not going to go through a 60-page deposition.

Mr. MURPHY: I submit that is the proper way to do it, to use your phrase.

97 The COURT: I will take the answer. Go ahead.

A. Mr. Brown, I was not present at the hearing that was declared to be illegal. I think the date of that was in October, 1949. I was present—in fact, I was the examining officer at the hearing held in September of this year. At that hearing he did not take the stand when asked to do so by the presiding officer, but at that hearing through his counsel, that was yourself, the petitioner admitted membership in the Communist Party from 1919 until about 1938, and from 1947 to the date of the hearing. He was a member at the time of the hearing. He also admitted

that he was Financial Secretary of the Hamtramck Section of the Communist Party.

To that extent, he was cooperative.

By Mr. BROWN, continuing:

Q. And the Attorney-General had knowledge of that information, did he not?

A. That, I cannot answer as to that.

Mr. BROWN: That is all.

REDIRECT EXAMINATION.

By Mr. MURPHY:

Q. That hearing was on September 19, 1950, was it not?

A. I just remember it was September, 1950.

Q. And at that time the Attorney-General did not have the benefit of the McCarran Act?

A. That is correct.

Mr. MURPHY: That is all.

The COURT: You say you, as Hearing Examiner, asked the witness to take the stand and be sworn?

A. No, sir. There was a Hearing Examiner who presided. He asked the petitioner to take the stand. I was the examining officer representing the Government.

The COURT: Oh, I see. And did he refuse to take the stand?

A. He merely declined to take the stand at that time.

The COURT: All right.

98 RE-CROSS EXAMINATION.

By MR. BROWN:

Q. Mr. Sureck, in the practice of the hearings, deportation hearings before the Department, the deportee, the alleged deportee, has the right to take the stand or not take the stand; is that correct?

A. It is the usual procedure to ask the deportee to take the stand.

Q. And he did enter into a stipulation at that time admitting the facts that were set forth in the previous hearing, did he not, namely, that he had been a member of the Communist Party and was Financial Secretary of the Hamtramck Section?

A. That is correct.

Q. So that, so far as the record was concerned for deportation purposes that stipulation was adequate?

A. That is correct.

Q. And if there was anything that was lacking in the stipulation, you still had the right to put him on the stand under the rule and obtain that further information from him?

A. I wouldn't say we had a right to put him on the stand. He declined to take the stand when asked by the Hearing Officer. That is my recollection.

Q. Well, let me ask you to recollect further, if you will, Mr. Sureck, and try to recall that the reason he did not take the stand was because we had agreed to stipulate certain facts which would have facilitated the proceeding, making certain admissions which the Department wanted and could have gotten from his being on the stand?

Mr. MURPHY: I submit as to that the record will be——

Mr. BROWN (Interposing): At any rate——

Mr. MURPHY (Interposing): Just a minute. (Continuing):— that the record of the hearing would be the best evidence.

The COURT: I will take the answer.

A. I cannot tell you, Mr. Brown, what might have been your reasons for not putting the man on the stand. You were the one that made the decision at that time. All I can testify is what took place, what I observed.

99 By Mr. BROWN, continuing:

Q. Let me ask this, Mr. Sureck: From our conversation at that time do you not recall that the reason for his not taking the stand was because by stipulation you could have gotten whatever information was required for your purposes; is that correct?

A. It was my understanding at the time of the hearing we would reach an agreement as to his membership, which would be similar to what was done in the previous hearing. That was correct.

Q. And there was nothing else asked that was refused in the stipulation? I mean, whatever was asked for was granted, was it not?

A. I don't remember everything was granted, but you agreed sufficiently to prove membership in the Communist Party.

Mr. BROWN: That is all.

* * * * * * *

REDIRECT EXAMINATION.

By Mr. MURPHY:

Q. This stipulation was a stipulation entered into by yourself and Mr. Brown; is that correct?

A. And the petitioner.

Q. Did the petitioner sign it?.

A. It was an oral, a verbal agreement.

Q. Was he sworn as a witness?

A. To my knowledge, the petitioner was not sworn. To my knowledge, the agreement was—to my recollection, the agreement was made by Mr. Brown, or expressed to the Court, and it was agreed to by myself and I believe——

Q. (Interposing): In the presence of——

A. (Interposing): In the presence of the petitioner.

Q. In the presence of the petitioner?

A. Right.

Q. After he had declined to take the stand?

A. That is my recollection.

Mr. MURPHY: That is all.

* * * * * * *

100 RECROSS EXAMINATION.

By Mr. BROWN:

Q. Mr. Sureck, are you trying to leave the impression here that he refused to take the stand or that it was easier for the Government if we stipulated membership in the Communist Party at the date that you knew he had been a member, or at least as to the dates that you had information that he was a member?

A. I don't want to leave any particular impressions, Mr. Brown. I merely want to inform the Court that at the time of the hearing you decided not to put the respondent on the stand. What your reasons were, I do not know.

Q. Wasn't that——

A. (Interposing): I want to add, further, that I expected to reach an agreement with you as to membership. That may have been your reason for not putting him on the stand.

Q. Wasn't it for the purpose of facilitating the proceeding, and the Service wanted certain information about him, and that was given to you voluntarily by stipulation, wasn't it? It wasn't because he declined to take the stand on that ground. It was because you wanted a stipulation regarding certain facts, and the stipulation was given to you, without objection, in open court. Isn't that what took place, Mr. Sureck?

A. On the one hand it might have facilitated the hearing; but, on the other hand, the Government did not have the benefit of asking the petitioner questions which it would like to have asked him.

Q. You didn't raise that objection to me, though, at the time, did you?

The COURT: Well, the thing has been completely developed.

Mr. BROWN: All right.

The COURT: The petitioner declined to take the stand upon your advice, and there was a stipulation entered into, but that apparently, wasn't comprehensive enough for the Government. That is what I take from his testimony.

Mr. BROWN: That isn't what took place, your Honor.

The COURT: He just got through saying they would have desired to ask the petitioner certain questions, which they were foreclosed from doing because he declined to take the stand. That was the testimony.

101 By Mr. BROWN, continuing:

Q. Mr. Sureck, just so it is clarified in the Court's mind as to what actually took place——

The COURT: (Interposing): My mind is well clarified. Your mind seems to be the mind that can't be clarified in this proposition.

By Mr. BROWN, continuing:

Q. Mr. Sureck, let me ask you this: You could have refused the stipulation, could you not, under the law?

A. I did not have to enter into the stipulation, that is correct.

Q. Under the law, if he refused to take the stand, you could have put on any testimony that you had that was obtained at a prior hearing, such as the preliminary hearing on May 25th; is that correct?

A. I could have introduced that preliminary statement, that is correct.

Q. In other words, it was your choice that the stipulation was made or rejected; is that correct?

A. The choice of the Service, but it is my recollection that the stipulation was agreed to because it presented a more accurate picture of his membership in the Communist Party.

In other words, at his preliminary hearing he did not admit at that time the period of membership which you agreed to in your stipulation.

Q. That is right. You did not disclose that to me, though?

A. It wasn't necessary.

Q. All right. But, the point I want to make is that under the law, at deportation hearings either you have the choice of compelling him to take the stand or else, if he declines, any conclusion that the presiding inspector can make will be final so far as——

The COURT (Interposing): He has already answered it. He can't compel the man to take the stand.

By Mr. BROWN, continuing:

Q. But you could have refused the stipulation, and put on the other record, couldn't you? It was a voluntary choice on
102 your part to accept that stipulation indicating membership during certain periods of time?

A. Well, I don't think I have to answer here what motivated my decision at that time.

Mr. MURPHY: I think all he is asking is whether it was voluntary, Mr. Sureck.

The COURT: No. This thing originally started, as I recall,—the reason for this line of questioning is whether or not the petitioner cooperated, and that is the basis for this questioning.

Mr. MURPHY: The inference I was getting was that the witness was giving Mr. Brown the impression that somebody was holding a gun at his head. I don't think that is the witness' position at all.

By Mr. BROWN, continuing:

Q. Well, now, at the hearing on October 20 and 21, 1949, Mr. Zydok did take the stand, did he not?

A. Mr. Brown, I took no part in that hearing.

Q. But this transcript is part of your record, is it not?

A. From the transcript I know he did take the stand, yes.

Q. And he was examined at length, was he not, by the presiding inspector?

A. Well, I presume that he would have been.

Q. So it wasn't that he declined to take the stand?

The COURT: You are talking about two different occasions here, aren't you?

A. I am talking only about the hearing of September, 1950.

By Mr. BROWN, continuing:

Q. On October 20, 1949, and on October 21st, was the first deportation hearing against Mr. Zydok?

A. That is correct.

Q. At that time he took the stand, did he not?

A. Yes, that is correct.

Q. At that time he was examined by Mr. Patterson, the examining inspector, and he was sworn; is that correct?

A. I am sure that is correct.

103 Q. And after he took the stand a stipulation was made in this hearing, in this deposition, admitting membership during certain periods of time; is that correct, Mr. Sureck?

A. I think that is correct.

Q. So that when he appeared at the hearing in September, 1950, at the second deportation hearing, you had the benefit of this transcript?

A. That is correct.

Q. You had the benefit of prior stipulation?

A. That is correct.

Q. You had the benefit of certain admissions?

A. That is correct.

Q. And you still accepted the stipulation of membership instead of his direct testimony on the stand?

A. He didn't take the stand at the second hearing, Mr. Brown. If he had been willing to take the stand I wouldn't have accepted the stipulation.

Q. Do you have a transcript of that proceeding that was taken in September, 1950, with you?

A. Yes, sir.

Q. May I see it?

A. I have it here.

Q. May I see it, please?

A. Yes, sir. (Handing document to Mr. Brown.)

Q. Mr. Zydok was sworn on that day, wasn't he, Mr. Sureck?

A. I would have to examine the transcript. I have no present recollection of that fact.

Q. All right. (Handing document to the witness.)

A. He was sworn for the purpose of identifying the warrant.

Q. Can you show me, Mr. Sureck, in this transcript where Mr. Zydok was asked to take the stand and he declined?

(The witness thereupon examined the transcript.)

The COURT: It is recess time. I will take a 15-minute recess.

(A recess was thereupon taken.)

* * * * * * * *

104 Q. (By Mr. BROWN, continuing): You have had an opportunity, Mr. Sureck, to look over the testimony of the hearing in September, 1950, have you not?

A. Yes, sir.

Q. What is your recollection now as to whether he was asked to take the stand at that time?

A. I find, Mr. Brown, that my recollection in connection with the deportation hearing of September 19, 1950, was not good. I find that in that case he wasn't asked the question whether or not he was going to take the stand. I apparently got myself confused between the transcript of the September 19, 1950 case and the previous hearing on October 20, 1949, where he was asked that question.

Mr. BROWN: Thank you.

* * * * * * * * *

RE-DIRECT EXAMINATION.

By Mr. MURPHY:

Q. And in the previous hearing was he asked to take the stand?
A. At that time when he was asked to take the stand through his counsel, he declined to take the stand at the time the question was asked.
Q. And in the second hearing, then, a stipulation was entered into between counsel as to his Communist Party affiliations; is that correct?
A. Yes, sir.

Mr. MURPHY: That is all.

RE-CROSS EXAMINATION.

By Mr. BROWN:

Q. But, at the previous hearing on October 20 and 21, 1949, he did take the stand later?
A. Later on in the hearing he did take the stand.
Q. And was fully examined by the presiding inspector?
A. That is correct.

Mr. BROWN: That is all.
105 Mr. MURPHY: That is all.

(The witness was thereupon excused.)

COLLOQUY

The COURT: Is there any additional objection to the admission of that Exhibit No. 5, the transcript of that hearing?
Mr. MURPHY: Of May 25, 1949.
Mr. BROWN: Yes your Honor. I object to it for the same reasons which I originally gave. There are other transcripts in the proceeding taken later, and I have no objection to those, which are official transcripts of the hearing at which he was sworn and in which he had

benefit of counsel. And, for the purpose of the record, I may say that there is contained in those later transcripts admissions that he had been a member of the Communist Party and that he was Financial Secretary of the Hamtramck Section of the Communist Party.

The COURT: Well, I will ——

Mr. BROWN (Interposing): There is no argument about that portion of it, your Honor.

The COURT: I will admit Exhibit No. 5 as a record of the United States Department of Justice that was available to the Attorney-General of the United States at a time prior to the time this petitioner was taken into custody under the apparent provisions of the McCarran-Wood Act.

Now, if you have any other or additional transcripts that you want to offer, Mr. Brown, why, I certainly will be glad to see them.

Mr. BROWN: Well, I ——

The Court (Interposing): I am not passing on whether the hearing was regular or irregular. I am just accepting that as information that was in the possession of the Attorney-General of the United States prior to the time I have just mentioned, and which may or may not assist me in reaching a conclusion as to whether or not the Attorney-General of the United States abused any discretion vested in him by the Congress in relation to the present petition I have before me.

Mr. BROWN: Very good, your Honor. And, in that connection I may say this, that I have no objection to the Court examining the subsequent proceedings that took place in the deportation hearing, but I do not want to make them a matter of record because I do not want to clutter up the record, for the reason it might be too expensive in case of an appeal.

106

That concludes the testimony so far as I have on behalf of the petitioner.

The COURT: All right.

Mr. MURPHY: The Government has no further testimony, your Honor.

The COURT: All right. Will there be an argument?

(Further discussion was had between Court and Counsel, which was reported, but is not here transcribed.)

[Reporter's Certificate omitted in printing.]

107

IN UNITED STATES DISTRICT COURT.

NOTICE OF APPEAL—Filed November 16, 1950

SIRS:

You and each of you will please take notice that John Zydok, the petitioner-appellant in the above entitled matter, hereby appeals

to the United States Court of Appeals for the Sixth District from the Findings of Fact, Conclusions of Law and Order of Honorable Thomas F. Thornton, one of the Judges of the United States District Court for the Eastern District of Michigan, Southern Division, made and entered on the 10th day of November, 1950, denying the petition for writ of habeas corpus filed herein.

Dated: Detroit, Michigan, November 14, 1950.

ALAN N. BROWN,
Attorney for Petitioner-Appellant,
Office & P. O. Address
963 Penobscot Building,
Detroit 26, Michigan.

To: GEORGE M. READ,
Clerk of the United States District Court
for the Eastern District of Michigan
Southern Division

EDWARD T. KANE,
United States Attorney for the
Eastern District of Michigan,
Attorney for Respondent-Appellee,
Federal Building,
Detroit 31, Michigan.

108-109 IN UNITED STATES DISTRICT COURT

STIPULATION—Filed December 7, 1950

It is hereby stipulated and agreed between the parties hereto by their respective counsel, that Exhibit 5, referred to on page 105 of the Transcript of Proceedings [page 86 of the printed record], and referring to the deportation proceeding held May 25, 1949, shall be submitted to the Sixth Court of Appeals as an original exhibit.

ALAN N. BROWN,
Attorney for Petitioner-Appellant.

EDWARD T. KANE,
United States Attorney,

By JOSEPH C. MURPHY,
Attorney for Respondent-Appellee.

Dated: Detroit, Michigan, December 1, 1950.

[Stipulation Re Designation of Record on Appeal omitted in printing.]

110 [Stipulation Re Comparison of Record omitted in printing.]

111 Clerk's Certificate to foregoing transcript omitted in printing.

112 IN UNITED STATES COURT OF APPEALS

JUDGMENT—Entered March 26, 1951

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in
113-114 this cause be and the same is hereby reversed.

115 UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11312

JOHN ZYDOK, *Appellant*,

v.

JAMES W. BUTTERFIELD, Director of the Immigration and Naturalization Service, Detroit, Michigan, *Appellee*.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION—Decided March 26, 1951

Before HICKS, Chief Judge; ALLEN and MILLER, Circuit Judges.

HICKS, Chief Judge. Appeal from an order of the district court dismissing a writ of habeas corpus.

Appellant, John Zydok, an alien, entered the United States in 1913. He was arrested in August, 1949 upon a warrant issued by the Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service of the United States Department of Justice.

The warrant charged that he was found in the United States in violation of the Immigration Laws. The specific charge was that he was a member of an organization that advised, advocated or taught the overthrow, by force or violence, of the Government of the United States; and which wrote, circulated, distributed, printed, published or displayed written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government.

Appellant was released under bond in the sum of $2,000.00. The condition of the bond was that appellant "shall be produced when required for a hearing or hearings in regard to the charge
116 upon which he has been taken into custody, and for deportation if he should be found to be unlawfully in the United States." 8 USCA, Sec. 156 (Sec. 20 of the Immigration Act of 1917).

Following appellant's arrest, a deportation proceeding was instituted against him before the Immigration and Naturalization Service at Detroit, Mich., to determine the deportability of appellant and this proceeding was pending when appellant was again arrested on October 23, 1950. His re-arrest was based upon the following provision of Sec. 23 of the Internal Security Act of 1950, to wit:

> ". . . Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole,"

and was without warrant. He was held in prison without bail; hence the writ of habeas corpus.

The pertinent question here is, whether the Attorney General abused his discretion in causing appellant to be held without bail.

It is undeniably true that appellant was, before his original arrest, a member of the Communist Party and was financial secretary of the Hamtramck Division of the Communist Party of Michigan for the year 1949 and that as such secretary he assisted in the collection of funds to be used in the defense of the Communist Party leaders who were tried and convicted in New York under the Smith Act (18 USC, Sec. 2385) of conspiring to advocate the overthrow of the Government and that the United States Department of Justice had information to that effect when appellant was rearrested. If in the exercise of sound judgment upon whether appellant should have been continued in custody, or have been released on bail, the Attorney General was limited to a consideration of the undisputed fact that appellant was a Communist, little may be urged against his decision in view of the preamble to the Internal Security Act of 1950. But we think that in determining whether appellant should have been

granted or denied bail the Attorney General had a much wider latitude for decision.

Discretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision in view of all the attending circumstances. *The Styria, Scopinich, Claimant*
117 v. *Morgan*, 186 U. S., 1, 9. There are many circumstances which involve decision.

Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army.

Before his second arrest and while he was at large on bail he reported regularly to the Department of Immigration and Naturalization Service. The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities. The fact that he assisted in collecting funds for the aid of the Communist defendants being tried under the Smith Act can hardly be regarded as an objection to the allowance of bail, for these defendants themselves were allowed bail after the affirmance of their convictions and even during the pendency of their appeals. *Williamson, et al. v. United States*, U. S. Supreme Court, Law Ed. Advance Opinions, opinion by Mr. Justice Jackson, Nov. 20, 1950, pending certiorari.

The deportation proceedings against appellant have been pending since October, 1949 and there is no indication of an early termination thereof. In the meantime appellant is confined in jail.

The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

The district court seemed of the opinion that it was the duty of appellant to make such clear and convincing showing as would justify it in holding that the Attorney General or his subordinates had gone beyond the limit of sound discretion in denying bail and the court found that as a witness appellant had ample opportunity to testify that he was not a member of the Communist
118-119 Party or a part of the Communist movement at the date of his last arrest. While on the witness stand appellant

claimed his conditional privilege against self-incrimination and upon that ground declined to testify touching his Communistic relations. We think that his refusal to testify should not have operated against him. *Blau* v. *United States*, decided by the Supreme Court on Dec. 11, 1950.

We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount. This view is more nearly in accordance with the spirit of our institutions as it relates even to those who seek protection from the laws which they incongruously seek to destroy. See *Carson* v. *Landon, Dist. Director, etc.* (CCA 9), decided Dec. 16, 1950; *United States* v. *Dist. Director, etc.*, 169 Fed. (2d) 747, 752 (CCA 2).

The result is that the order dismissing the writ of habeas corpus is reversed and the case remanded to the district court with directions to proceed in accordance with the views herein expressed.

Reversed.

120 SUPREME COURT OF THE UNITED STATES

No. 136, October Term, 1951

[Title omitted.]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 35, *Carlson et al. v. Landon, District Director, etc.*

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 972472 340

Office-Supreme Court, U. S.
FILED
APR 28 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,
Petitioners,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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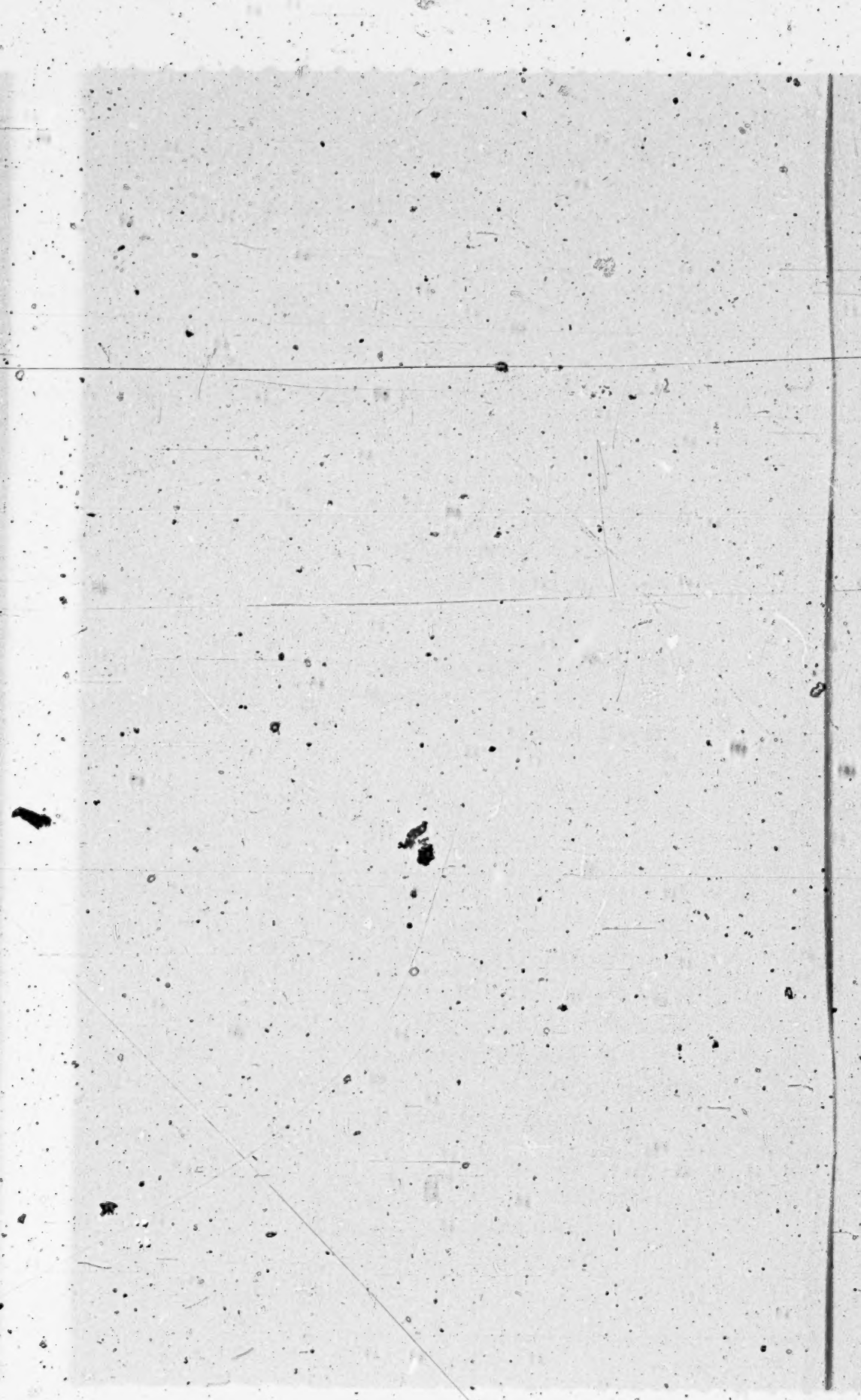

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 53

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,

Petitioners,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the decisions and judgments of the United States Court of Appeals for the Ninth Circuit, rendered March 13, 1951 (R. 350-3),[1] affirming in a single opinion orders of the United States District Court in and for the Southern District of California, Central Division, rendered January

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[1] Meaning, Transcript of Record, pages 350 to 353, inclusive.

22, 1951 (R. 65-6; 107-8; 144; 175-6), denying petitioners' respective petitions for habeas corpus and dismissing writs of habeas corpus theretofore issued.

Jurisdiction

The judgments of the Court of Appeals were rendered and filed March 13, 1951 (R. 350-3). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c).

Opinions Below

The cause herein was before the District Court and the Court of Appeals upon two occasions. The initial opinion of the District Court (R. 18) is reported in *Ex Parte Carlson*, 94 F. Supp. 18. The initial opinion of the Court of Appeals (R. 28; 111; 149; 180) is reported in *Carlson* v. *Landon*, 186 F. (2d) 183, related case, *Mangoang* v. *Boyd*, 186 F. (2d) 191. The District Court wrote no opinion in rendering its second judgment (R. 65-6; 107-8; 144; 175-6). The second opinion of the Court of Appeals (R. 331) is reported in *Carlson* v. *Landon*, 187 F. (2d) (Adv. Ops.) 991.

Statute Involved

The statute involved in the cause herein is section 20(a) of the Immigration Act of February 5, 1917, as amended by section 23 of the Internal Security Act of 1950. In material parts the said statute, as amended, provides as follows:

> "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody,

or (2) be released under bond in the amount of not less than $500.00, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made."

Statement of the Matter Involved

The proceedings here are in habeas corpus. Petitioners are aliens, presently and ever since October 21, 1950[2] detained in custody and denied bail absolutely by the respondent District Director of the United States Immigration and Naturalization Service, Department of Justice, upon the orders of the Attorney General (R. 42; 91; 132; 162).

Prior thereto, between October 1947 and June 1950, upon dates unrelated one to the others, deportation proceedings were initiated against each of petitioners, charging each of them with being

> "... an alien who is a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow by force or violence of the Government of the United States, in violation of the Act of October 16, 1918" (R. 45; 94; 134-5; 165).

Each of petitioners was admitted to bail in said proceedings, the sums fixed therefor varying between $1,000.00 and $5,000.00 (R. 45; 95; 135; 166). Each of petitioners abided

---

[2] October 23, 1950 in the case of petitioner Miriam Stevenson.

faithfully by the terms of his bail. It is undisputed by the respondent that each petitioner

> "... at all times ... has been, now is, and will continue to be, available to appear and will appear at any and all hearings and other lawful proceedings in connection with the determination of his deportability;" (R. 5-6, 49; 73, 99; 156, 170; *semble* 115-6, 139).

On October 21, 1950 respondent caused petitioners Frank Carlson, Harry Carlisle and David Hyun to be arrested, notwithstanding their obedience to bail (R. 4; 154; 117) and ever since said date respondent has, and now does, detain said petitioners absolutely and without right to bail in any amount (R. 5; 156; 117). On October 23, 1950 respondent similarly proceeded against petitioner Miriam Stevenson (R. 71-2).

October 24, 1950 petitioners filed their respective petitions for habeas corpus herein and the writs prayed were issued by the District Court.

October 31, 1950 respondent caused each of petitioners to be served with new warrants of arrest, charging each petitioner to be deportable on the ground of being

> "... after entry ... an alien who was a member of the Communist Party of the United States of America;" (R. 4; 72; 117; 155).

This change in the warrant rendered the original writs technically moot. Accordingly, petitioners filed new petitions November 2, 1950 and new writs issued thereon. Thereupon, in answer to the issued writs, respondent filed returns in each of the proceedings, justifying his detention of each of petitioners upon the ground in each instance

> "That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public

interest, and would endanger the welfare and safety of the United States." (R. 11; 79; 125).

The District Court held this justification good and sufficient and discharged the writs (R. 24; 86), filing a written opinion (R. 18). Upon appeals from those orders the Court of Appeals, in its first decision herein, held the return insufficient as a matter of law and remanded for further proceedings (R. 28; 111; 149; 180).

Thereafter, the respondent filed in the case of each of the petitioners a new return (R. 40; 89; 130; 160) with an annexed affidavit (R. 45; 95; 135; 166) and, after traverse, a supplemental return (R. 55; 99; 139; 171). In these returns and affidavits the District Director justified his incarceration of petitioners upon the grounds that they were members of the Communist Party of the United States. That, and no more.

The District Director claimed for the Attorney General authority to so confine petitioners under section 20(a) of the Immigration Act of February 5, 1917, as amended by section 23 of the Internal Security Act of 1950 quoted in material parts earlier herein.

As to each petitioner the respondent set forth in an affidavit, executed by him and attached to his return, a narration of statements, speeches, publications and attendance at or participation in meetings, in each instance affecting and relating to either the Communist Party or other organizations "designated by the Attorney General as Communist", including the Civil Rights Congress, the American League for Peace and Democracy, the People's Educational Center, the League of American Writers and the American-Russian Institute. As to petitioners Stevenson, Hyun, and Carlisle, these activities were past only, the most recent in date being in the year 1948 as to petitioner

Stevenson, and 1949 as to both petitioners Hyun and Carlisle.

Upon the basis of these said activities on the part of each petitioner, summed up in the concluding sentence in each of the returns as "tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party", the Acting Commissioner of Immigration and Naturalization, acting for the Attorney General, concluded as to each petitioner

> "that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 44; 93; 133; 164).

The District Director in his return and affidavits made no claim whatever of the commission of any unlawful act by any of petitioners. Additionally, as previously stated, it was not disputed by the District Director that while at liberty under bail petitioners had always held themselves available and answerable under the deportation proceedings directed against each of them and if enlarged would continue to be available and answerable.

The District Court, this time without written opinion, again held the District Director's justification for detaining each of the petitioners sufficient and denied each of the petitions for habeas corpus and discharged each of the writs (R. 65; 107; 144; 175).

Upon appeal, the Court below affirmed. It ruled that while the statutory power of the Attorney General, above cited and quoted, to grant or withhold bail pending deportation was not an arbitrary or unreviewable power, it was not limited to the object of securing availability but

included the authority claimed by the Attorney General to incarcerate for "protective custody" purposes.

It ruled further that in pursuit of that purpose, since petitioners might be taken upon the record to be present members of the Communist Party, the Attorney General might by token of that alone incarcerate them and deny bail without claim or proof personal to any petitioner that he ever had committed or likely ever would commit any unlawful act. This ruling it justified upon the rationale that the outlaw character of every member of the Communist Party, as criminal traitors purposing and seeking "to maim [and] destroy our government by force and violence", has been established—not merely for purposes of newspaper editorials or political diatribes, but even for purposes of governmental acts affecting individual liberty and subject to judicial review—by the weight and force of "the legislative findings set out in the Internal Security Act of 1950", supplemented by judicial notice. This "proof" of the Communist Party's criminal character and of the attainder of all its members the Court below termed "incontrovertible" (R. 339).

Reasons for Granting the Writ

The Court of Appeals for the Ninth Circuit below has rendered a decision in the cause herein which is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Zydok* v. *Butterfield*, March 26, 1951, 6 Cir., 187 F. (2d) 802, a copy of which is appended to this petition as Appendix A.

Moreover, in determining that and other questions raised in the case at bar the Court below has decided important questions of Federal law of greatest import, both statutory and constitutional, which have not been, but should be, settled by this Court, and has decided the same in a manner

inconsistent with the principles contained in the decisions of this Court which bear most closely thereon.[3]

I.

The Decision Below Is in Conflict With the Decision by the Court of Appeals for the Sixth Circuit in Zydok v. Butterfield, Decided March 26, 1951.

The decision of the Court below sustained petitioners' confinement under the Attorney General's bail powers, despite the conceded fact that each of petitioners had always held himself available while previously enlarged on bail and that no grounds existed to believe that if bail were to be renewed, any of the petitioners would forfeit bail or fail to appear at and hold himself answerable under any and all further deportation proceedings. The Court below sustained the incarceration despite the further fact that the respondent District Director in his affidavits and returns made no claim that any of petitioners had ever committed personally a single unlawful act or had ever said or done anything rendering it likely to expect that he ever would commit any such act.

Upon a record precisely parallel, the Court of Appeals for the Sixth Circuit in *Zydok* v. *Butterfield*, cited *supra*, held an alien detained in identical circumstances was entitled of right to release on habeas corpus. In an opinion written by Chief Justice Hicks, the Court in the *Zydok* case said:

> "Before his second arrest and while he was at large on bail he reported regularly to the Department of Immigration and Naturalization Service. The record fails to disclose that he has violated any law or that

[3] Because of the important civil liberty issues herein, A. L. Wirin, attorney, American Civil Liberties Union, Southern California branch, is appearing on behalf of the petitioners herein of counsel.

he is engaged or is likely to engage in, any subversive activities. . . .

"The deportation proceedings against appellant have been pending since October, 1949 and there is no indication of an early termination thereof. In the meantime appellant is confined in jail.

"The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

* * * * * * *

"We think that a fair consideration of the factors above set out in their aggregate requires that appellant should have been granted bail in some reasonable amount. This view is more nearly in accordance with the spirit of our institutions as it relates even to those who seek protection from the laws which they incongruously seek to destroy. See *Carson (sic)* v. *Landon, Dist. Director, etc.*, (C. C. A. 9), decided Dec. 16, 1950; *United States* v. *Dist. Director, etc.*, 169 F. (2d) 747, 752 (C. C. A. 2)."

The parallel of the cases is precise. Of the affirmative side of the life of the alien incarcerated in the *Zydok* case, the Court there observed:

"Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II

while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army.''

This is almost interchangeable in body and content with the observations of the Court below respecting the life history of petitioner David Hyun:

> ''We take the personal history of this appellant as set up in his petition for issuance of the writ, from our former opinion and order reversing and remanding as of December 20, 1950 (186 F. 2d 190), as follows:
>
> '' 'Petitioner Hyun was born in Seoul, Korea; is 33 years of age; was taken to Hawaii at an early age and resided there until December, 1947. His schooling resulted in a bachelor of science degree. In school he appears to have been a leader in social and religious activities. Although disqualified for military service during the late war because of his status as an alien, he became Captain of Reserve Officers Training Corps at the University of Hawaii. He has applied for citizenship; is married and has two minor sons. He has resided in Los Angeles, California, since December, 1947, and has engaged in a useful occupation. Petitioner's petition is replete with a detailed account of his life.' ''[4]

The only words or acts personal to the petitioners of which the government complained in the case at bar (apart from Communist Party membership *per se*) consisted of no more ''unlawful'' matters than mere acts of assembly, speech and publication—all not merely negatively not un-

[4] (R. 343-4). The personal histories of the other petitioners, set forth at other portions of the opinion below, were comparable. They reflect the fact in each instance that the respective petitioners were stable, respectable members of the community, supporting families through pursuit of lawful means of livelihood.

lawful but affirmatively constitutionally protected. Thus, of petitioner Stevenson the whole of the government's claim, as set forth in the District Director's affidavit, quoted in the opinion below, was:

> ". . . with respect to petitioner Stevenson the Service is in possession of evidence showing that she has been a member of the Communist Party of the United States and has actively participated in its program; more specially that the petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; that she was the Secretary of a Communist Party Unit in 1938; that she participated in the 'Lenin' celebration in Los Angeles; that she admitted in 1948 attending Communist Party meetings and also admitted membership in the American League for Peace and Democracy (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and that in 1950 at a deportation hearing she refused to answer questions concerning her membership in the Communist Party on the ground of self-incrimination; . . ."[5]

Precisely comparable acts and activities by the alien were pointed to and relied upon in the *Zydok* case. Thus, the Court there noted that:

> "It is undeniably true that appellant was, before his original arrest, a member of the Communist Party and was financial secretary of the Hamtramck Division of the Communist Party of Michigan for the year 1949 and that as such secretary he assisted in the collection of funds to be used in the defense of the Communist Party leaders who were tried and convicted in New York under the Smith Act (18 U. S. C., Sec. 2385)

[5] (R.342-3). The complaints against the other petitioners were of a similar vein. Thus, of petitioner Hyun the Government complained, among other things, that he had helped form a branch of the Hawaiian Civil Liberties Committee on the west coast and that that organization had been designated by the Attorney General as a Communist organization.

of conspiring to advocate the overthrow of the Government and that the United States Department of Justice had information to that effect when appellant was rearrested."

Notwithstanding such activity by Zydok and notwithstanding even that the activity was on behalf of the Communist Party, the Court held Zydok entitled to bail of right. Relying upon the decision of Mr. Justice Jackson in *Williamson, et al.* v. *United States,* Sept. 25, 1950, 95 L. Ed. (Adv. Ops.) 10, the Court ruled that the bail power might not be made a pretext to punish peaceful and lawful conduct whether on behalf of the Communist or any other party where, absent the bail power pretext, such conduct could not be made subject to penalty.

The decision at bar is in direct conflict with the decision in *Zydok* v. *Butterfield.* It is in conflict, too, with the decisions of fifteen District Court Judges throughout the nation who have been called upon in habeas corpus actions to review the detention of aliens arrested under circumstances similar to the circumstances at bar. Like petitioners here, the aliens in all of those proceedings, after previous enlargement on bail pending hearings in deportation proceedings, were rearrested and denied bail absolutely upon the grounds that enlargement endangered "national security". The fifteen proceedings, affecting thirty-eight aliens, together with the case at bar and the *Zydok* case, affecting five, represent nationwide litigation precipitated by simultaneous arrests. Of all affected aliens the habeas corpus proceedings have resulted in release upon reasonable bail for all save petitioners here.[6] A summary of the District Court cases and their disposition in each instance is annexed hereto as Appendix B.

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[6] One of the others was released on bail pending appeal only. *In Re Heikinen,* Case No. 1101 (D. Minn.).

II.

The Imprisonment of Petitioners by the Respondent District Director Cannot Be Sustained in View of the Total Absence of Any Showing Personal to Any of Petitioners That Any of Them Had Ever Done or Likely Would Ever Do Any Unlawful Act.

The purpose of the writ of habeas corpus is "to inquire into the cause of imprisonment." *Graham* v. *Squier*, 9 Cir. 132 F. (2d) 681, 683; *Price* v. *Johnston*, 9 Cir., 144 F. (2d) 260, 261; *Wong Sun* v. *United States*, 6 Cir., 293 F. 273, 275. Once the writ is issued the burden is on the detaining authority to justify the detention. By the statute he is required to make a return "certifying the true cause of the detention." 28 U. S. C. A. 2243. Where the officer to whom the writ is directed admits the custody or imprisonment he "must . . . justify such custody or imprisonment of the person by the law, or that person must be discharged . . ." *In re DeLondi*, 2 Fed. Supp. 256, 257;[7] *Wong Sun* v. *United States*, *supra*; *Wales* v. *Whitney*, 114 U. S. 564, 571.

Consistent with these fundamental principles the District Director was under burden below to come forward under command of the writs and *justify* his detention of petitioners. Detention of one adult human being by another requires affirmative showing of lawful and constitutional right. Thus, had the respondent, for example, had custody of petitioners under a judgment of conviction for crime rendered by a court of competent jurisdiction he was burdened to produce it.

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[7] The decision in this case was later reversed *sub nom. Warden etc.* v. *Landi*, 5 Cir. 62 F. (2d) 981. The lower court had held the warden's proofs justifying the detention insufficient. The Court of Appeals held them sufficient. But the latter court expressed no disagreement with the reasoning of the lower court quoted above.

Here, the District Director purported to justify his confinement of petitioners under the bail powers granted the Attorney General by section 20(a) of the Immigration Act of February 5, 1917, as amended by section 23 of the Internal Security Act of 1950, set forth in the Statement of the Matter Involved, *supra*. In so doing, he pointed to no cause to believe—and claimed none—that petitioners would flee or secrete themselves if enlarged on bail. He stated merely that he had satisfied himself they were members of the Communist Party and that, as such, he had concluded that if left at liberty they would "engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 44; 93; 133; 164).

But this was far from a sufficient showing on habeas corpus. Abuse of the bail powers is not beyond reach of the law. Indeed, it was against arbitrary denials of bail that habeas corpus was historically "especially, although not exclusively, directed", as this Court has observed in commenting upon The Habeas Corpus Act of 31st Charles II, the parent statute from which flows all later habeas corpus law, American as well as English. *McNally* v. *Hill*, 293 U. S. 131, 137, n. 1. A primary purpose of that historic Act was to insure that habeas corpus would reach to and liberate persons held in jail upon "suspicions which could not be sustained by evidence." *Ex Parte Watkins*, 3 Peters 193, 202.

The case at bar is such a case of imprisonment upon an arbitrary suspicion. Not a single thing personal to petitioners has been claimed or proved. All that has been

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[8] More accurately, the Acting Commissioner of Immigration and Naturalization, acting for the Attorney General, and acting, also, as respondent District Director's superior. Hereafter, this chain of office, for simplicity purposes, will be deemed included within references to either the Attorney General or the District Director as individuals wherever such inclusion is appropriately called for.

claimed is that they were affiliated with the Communist Party. For this claimed membership *per se*, a claimed act of merest association, they have been denied individual liberty.

But it is fundamental in American law that guilt is individual. It is abhorrent to the rudiments of our justice to judge a man or attaint him because of his family, his creed, or his associations only. As Charles Evans Hughes, later Chief Justice Hughes, has said, "... it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts; ..."[9]; *Schneiderman* v. *United States*, 320 U. S. 118; *Bridges* v. *Wixon*, 326 U. S. 135; *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Baumgartner* v. *United States*, 322 U. S. 665.

Membership in the Communist Party on the part of an individual represents merely a lawful act of assembly and association. That party is as much entitled to enter the marketplace of speech and ideas and compete therein for members and adherents as is any other group or political party.

Additionally, even were it to be assumed arguendo that among the tenets of the Communist Party some were to be deemed to possess unlawful content, no conclusion that such unlawful matters had been accepted or embraced by, or that the tenets in question had been so viewed and understood by, any one or more individual members of that organization could be predicated upon their membership *per se*. *Schneiderman* v. *United States*, *supra*, at pp. 136, 154-5; *Bridges* v. *Wixon*, *supra*, at p. 143.

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[9] Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York, New York Legislative Documents, Vol. 5, 143rd Session (1920), No. 30, p. 4.

For guilt by association is particularly improper and wrongful where applied to association borne of opinions and ideas rather than of conduct. Joinder with others in a pattern of claimed unlawful acts is one thing: joint participation in a pattern of burglary, for example, might reasonably justify imputed responsibility under conspiracy principles for burglaries committed subsequently by others within the conspiratorial association. Not so with association borne only of common opinions and ideas. There the significance of the association must be far more cautiously measured. *Schneiderman* v. *United States*, *Bridges* v. *Wixon*, *Baumgartner* v. *United States*, all *supra*; *Knauer* v. *United States*, 328 U. S. 654, 669. For the acceptance, understanding and interpretation of ideas are acts peculiary individual in character. *Schneiderman* v. *United States*, *supra* at pp. 154-155; *Bridges* v. *Wixon*, *supra* at p. 143.

Of right and of principle individuals are to be judged by their own words and acts alone. They cannot, as here, be subjected to "preventive imprisonment" because friends, family or associates are believed to be possessed of "treasonable" thoughts.

III

The Statute Does Not Authorize Incarceration for "Security" Purposes If Construed and Applied So to Do the Statute would Violate the Eighth Amendment and Would So Pervert the Process of Bail As to Pefmit Without Statutory Standard and at the Utter Discretion of the Attorney General What Could Not Constitutionally Be Done—at Least While Courts of Law Remain Open—by the Most Carefully Drawn of Statutory Schemes.

The statute, previously cited, under which the Attorney General has incarcerated petitioners without leave to bail as "security risks" grants no such power as that to which

the Attorney General pretends. In material part the statute provides:

> "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500.00, with security approved by the Attorney General; or (3) be released on conditional parole."

The statute is a *bail* statute not a private license to imprison at will. Bail has a settled significance and purpose in law, a purpose which Congress must have had in contemplation when enacting the statute. That purpose is not detention *qua* detention but detention only where necessary to secure the availability and answerability of the accused to the substantive charge, criminal or civil, preferred against him.

Since the earliest years of the common law, bail has been recognized as a means of securing the appearance of a respondent. Purely auxiliary to a judicial proceeding, its function traditionally has been to provide an alternative to custody "by giving a form of security, property or bail to assure future appearance in court." 6 University of Toronto Law Journal 385, *Concepts of the Nature of Bail in English and American Criminal Law* (1946). See also *Sparhawk* v. *Bartlett*, 2 Mass. 188 (1806); *Hudson* v. *Parker*, 156 U. S. 277, 285.

Indeed, the original use of the term "bail" was to designate the sureties in whose custody the defendant was released. "Bail are sureties taken by a person duly authorized for the appearance of an accused person at a certain day and place to answer and be justified by law." Dalton's *County Justice*, ch. 166, part 2 (1796). As a power and

instrument of the law it has always served the one "purpose of securing the attendance" of the accused at necessary stages of the principal case. *McKnight* v. *United States*, 113 F. 451, 453; see generally, Petersdorff, *The Law of Bail* (1835).

Not being intended as the infliction of punishment, the bail power may impose imprisonment pending trial upon the impecunious, whether guilty or innocent. But equally, since its purpose is availability alone, bail lies of right where it lies at all. This has been the rule from the earliest common law:

> "For the common law has been always so before, for the common law, which is common reason, did ever allow that such persons as were taken by writ, bill or warrant, in any action personal, or indictment for trespass, might be let at large upon sureties, for it stands indifferent in a manner whether they are guilty or not, and then if they are not guilty, and should be restrained of their liberty, it would be a great inconvenience, which the common law will never suffer . . ."
> —Montague, Ch. J., *Dive* v. *Maningham*, 1 Plowd. 60 (1550).

Chief Justice Lord Russell, three hundred and fifty years later restated the mandate of the English law as follows:

> "It cannot be too strongly impressed upon magistrates that bail is not intended to be punitive but merely to secure the attendance of the prisoner at the trial or to come up for judgment."—*Reg.* v. *Rose*, 68 L. J. Q. B. 292 (1898).

The American law has always followed and accorded with these basic principles. See, e.g., *Garvey* v. *United*

States, 292 F. 591; *Harrington* v. *Dennie*, 13 Mass. 92; *Maloney* v. *Nelson*, 158 N. Y. 351.

> "Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief."—*McKnight* v. *United States*, 113 F. 451, 453.
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> "It will be observed that the character of the crime charged or probable guilt or innocence is not suggested as having any bearing . . . The granting or withholding of bail is not a matter of mere grace or favor."—*United States* v. *Motlow*, 10 F. (2d) 657, 662, Mr. Justice Butler sitting as Circuit Justice.

In the light of the settled purposes of the bail power there is no room for the Attorney General to pretend to authority under the statute here to institute "security" arrests. It is simply foreign to the whole nature of bail to assume under its function, as has been done here, authority to impose detention *qua* detention, without even claim of a relation to availability.

The Attorney General stresses that the terms of the statute invest him with "discretion". But the discretion conveyed by the statute is to grant or withhold bail pending determination of deportation proceedings, not to hold aliens for ransom or to nightride against political or other minorities. The discretion must be exercised to subserve availability purposes only or it passes at once the bounds of its statutory source. Here availability was undisputed; in consequence no area for discretion remained.

To accede to the Attorney General's claim that he has power under the terms of the statute here to imprison persons he deems "security risks" would be to indulge

him in a claim to wholly arbitrary authority. If under the statute he may withhold bail for supposed "security" reasons, he may likewise withhold it for any other reasons he finds appealing. He may withhold it even for political purpose. For Congress has given him no standard save the historical common law standard of availability. That passed, there are no bounds to his discretion save his own pleasure.

Moreover, if the statute were to be construed as the Attorney General would read it, it would defy both reason and the Constitution.

It would defy reason because it would be senselessly discriminatory against aliens.[10] It is not even claimed by the Attorney General that he has power generally to institute "security" arrests.

It would defy the Constitution because that instrument protects aliens and citizens alike, and each and every one among them, including the humblest and most defenseless, against arbitrary deprivations of liberty. In our nation no officer stands above the law and no person below it.

Yet the arbitrary imprisonment of petitioners in the case at bar has been without so much as an apology, let alone a right or a justification. Petitioners have been jailed by the Attorney General under the pretext of his bail powers. Yet it has not even been claimed that they ever violated the terms of their former bonds. Neither has it been claimed that they have ever committed any unlawful acts. They have been subjected to "preventive detention". They must

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[10] The statute, so far from supporting the Attorney General in perverting his bail powers to institute "security" arrests against aliens, makes express provision for "security" arrests under its second Title under circumstances and subject to conditions precedent which would not permit of the arrests below, and it does so for citizens and aliens alike. The statute thereby expressly negates the authority which the Attorney General would imply. In petitioners' view the statutory provisions treating "security" arrests are unconstitutional in themselves though that question is not here reached.

remain in jail unless they can prove they will not do what no one claims they ever have done. This Court has said, "Conviction on a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362. What of detention, as here, without even claim that an offense exists.

The writ of habeas corpus would be a mockery if it could not release from jail persons not even accused of unlawful acts but only of "risk" that they might in the future commit such. Congress is forbidden to suspend the privilege of the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it" (Art. I, Sec. 9, Cl. 2, United States Constitution).

The writ being unsuspended in fact and there being no basis for its suspension in law, it passes imagination to appreciate that these petitioners have been in jail five and one-half months to date.

Patently, in the Attorney General's eyes either aliens have no rights or bail as a power has no limits. He has jailed petitioners as he would lock up chattels in a warehouse.

Yet aliens under the Constitution have exactly the rights, liberties and protections which citizens have, no more and no less, save only that aliens unlike citizens may be held liable to deportation. *Bridges* v. *California*, 314 U. S. 252; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Bridges* v. *Wixon*, 326 U. S. 135, 148; *Schneiderman* v. *United States*, 320 U. S. 118. The same immunity from arbitrary arrests and detentions protects aliens as protects citizens. The protection of each rises from a single Bill of Rights which speaks of neither as a class but rather vouchsafes liberty and freedom to "the people" and to all "persons".

Moreover, bail as a power is expressly limited by the Constitution. The Eighth Amendment prohibits all agencies

of government from the exaction of "Excessive bail". The Amendment is not limited in its protection to citizens nor is it made applicable to strictly criminal proceedings alone. Wherever bail is available in law the Constitutional command is that it shall not be suffered to be "Excessive". This can ill be argued with, for a bail which is definitionally "excessive" is definitionally arbitrary. The Constitutional provision was cast for just such a case as the one at bar where bail has been purposefully misused to achieve detention *qua* detention without relation to securing appearance. To deny bail absolutely where availability is not merely probable but undisputed, as is the case here, is to violate both the reason and the letter of the Eighth Amendment and, by the violation, to illustrate the wisdom of the Constitutional limitation.

Finally, even were the Eighth Amendment laid aside and the Attorney General's act deemed superficially lawful, still the act would remain invalid and void. For under the Constitution not even superficially lawful powers may be used for unconstitutional ends. *Lake Shore* v. *Smith*, 173 U. S. 684, 689; *United States* v. *Butler*, 297 U. S. 1, 68; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. "[In] passing upon constitutional questions the Court has regard to substance and not to mere matters of form" (*Near* v. *Minnesota*, 283 U. S. 697, 708) and it would be an affront to the intelligence of the drafters to suppose that the Constitution could permit Congress or other governmental representatives to achieve by evasion or disguise ends which they are Constitutionally prohibited from achieving forthrightly. See *United States* v. *Constantine*, 296 U. S. 287.

> "If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction

by . . . indirect but no less effective process[es] . . ."—*Frost* v. *Railroad Commission*, 271 U. S. 583, 593.

Consistent with these principles bail may not be used, as it has been here, as a mere device for incarcerating persons without even charge of offense simply because a head of government finds the views or associations of such persons distasteful. *Bridges* v. *United States*, 184 F. (2d) 881, 885-891.

> "It is not contended that these utterances in themselves are criminal. The Communist Party has not been outlawed either by legislation nor by these convictions, and its right to publish the Daily Worker is not questioned . . . Since the paper may lawfully be issued, certainly its publishers or contributors may comment critically on the Government's conduct of foreign affairs. If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirect. I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free."—*Williamson, et al.* v. *United States*, 95 L. Ed. (Adv. Ops.) 10, 14, Mr. Justice Jackson sitting as Circuit Justice.

IV.

Petitioners' Imprisonment Below Was Held Justified Per Se by Supposed Communist Party Membership Without Evidence Affecting the Character of That Organization Save for (1) Alleged Legislative Findings and (2) Supposed Judicial Notice. To Sanction Incarceration in Such Premises Negates the Judicial Function, Offends the Constitutional Separation of Powers, Attaints the Members of An Identifiable Group and Class by Acts of Legislative and Judicial Fiat, and Violates Due Process of Law.

In the instant case the petitioners have been jailed by the Attorney General and the Court below has sanctioned and sustained their detention upon the fact alone that petitioners, upon the record, might be taken to be—for purposes of habeas corpus though not for purposes of deportation—members of the Communist Party. The premise upon which this was rested is that the Communist Party is an outlaw organization and all its members are outlaw conspirators. As "proof" "clear and incontrovertible" that the Communist Party constitutes such a conspiracy the Court below relied upon (1) a non-existent legislative attainder which would be grossly unconstitutional even if discovered, and (2) supposed judicial notice.

Witness the below excerpt from the opinion of the Court below:

> "It is said by appellant that there is no proof here as to the intention of the Communist Party of the United States or of Communists to maim or destroy our government by force and violence, and cites the *Schneiderman* case (320 U. S. 118 (1943)). The *Schneiderman* case was of yesterday. As Justice Hughes one time so expressively said, 'Courts do not

function in a vacuum.' The courts today are acquainted with current history and, too, with the legislative findings set out in the Internal Security Act of 1950, from which we quoted liberally in the first *Carlson* opinion.

"The existence as of today of a worldwide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible."

The conclusion to the opinion of the Court below declares that the trial court "came to the correct and legal conclusions" in "the light of the times."

The foregoing statements of law by the Court below in effect amend every article and clause in the Constitution so as to read "save and except for members of the Communist Party". Even for purposes of judicial trials and hearings, these statements outlaw that party *per se*. They relieve the government in any proceeding against claimed members of that organization from the duty to furnish proof in support of any charge it may choose to prefer against the organization. They then pronounce the proof not furnished "incontrovertible". To the remonstrance by the aggrieved individual that he has had no hearing, they reply by asking him of what he complains when a legislature he has never seen has long since tried the matters and found against him anyway. This, for the Communist Party, is justice in "the light of the times". The most elementary rights to due process, trial and hearing for persons claimed to be members of that party receive now the answer—"Those were of yesterday."

The "law of the land", as is stated in words of Daniel Webster often approvingly quoted by this Court, requires in absolute minimum "a law which hears before it condemns." *Powell* v. *Alabama*, 287 U. S. 45, 68. Indeed, that

the Constitution commands at least this much "needs nothing but statement." *Riverside and Dan River Cotton Mills, Inc.* v. *Menefee*, 237 U. S. 189, 193. As stated in *Powell* v. *Alabama, supra*, at p. 68, "It never has been doubted by this Court, or any other so far as we know", that "hearing" is a prerequisite to due process. It is so because it is required by the "immutable principles of justice which inhere in the very idea of free government and which no member of this Union may destroy." *Holden* v. *Hardy*, 169 U. S. 366, 389.

But of what avail is a "hearing" if guilt has been predetermined. What kind of trial can it be which opens with a pronouncement that the government's case has previously been established by "proof" which, though not to be produced, is none the less to be taken as "incontrovertible". To take judicial notice of guilt before even holding a trial is to make mockery of due process. As the Supreme Court of California has said with commendable restraint, "That is not the law.":

> "As was pointed out in the *Reeves* case, *supra*, to hold that this court will take judicial notice of the alleged fact that the Communist Party advocates force and violence, without any evidence of that fact, would not only require judicial notice of a fact which plaintiffs and their counsel vehemently deny, but it would also necessitate a finding that every registered communist is a felon and could be convicted of a violation of our criminal syndicalist law upon mere proof of membership in the Communist Party. That is not the law."—*Communist Party* v. *Peek*, 20 Cal. (2d) 536, 548. See also *State* v. *Reeves*, 5 Wn. (2d) 637, 130 A. L. R. 1465; *Ex Parte Fierstein*, 9 Cir., 41 F. (2d) 53, *accord*.

This Court cannot suffer the decision below to stand in the face of *Schneiderman* v. *United States*, 320 U. S. 118.

The *Schneiderman* appeal could not even have been heard had the rule of the Court below ever been well grounded. Judicial notice of guilt would have made the case moot without even necessity for appellate review of the evidence. Yet this Court there reviewed the evidence which had been taken upon trial and, upsetting two lower courts' conclusions to the contrary, found innocence had not been overbalanced.

The principles of the *Schneiderman* case are fundamental. They cannot be dismissed as good only "of yesterday". It does violence to the entire concept of due process to permit supposed "judicial notice" to displace hearing, evidence and trial. Particularly so in cases involving human liberty.

In an effort to escape in at least some measure a naked determination of guilt by judicial notice, the Court below has pointed, as has the Attorney General, to the "legislative findings" of the Internal Security Act of 1950. It is argued that that Act, which among other things included various regulations affecting aliens, explicitly or implicitly has already determined the guilt of the Communist Party as a conspiracy practicing all of the crimes of violence, sabotage and treason described in section 2 of its terms.

Were the statute to be read as the Attorney General and the Court below would read it, the statute would thereby become an attainder and a nullity in law. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86-87. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." *Manley* v. *Georgia*, 279 U. S. 1, 6. See also *Tot* v. *United States*, 319 U. S. 463; *Morrison* v. *California*, 291 U. S. 82; *Western and Atlantic Railway Co.* v. *Henderson*, 279 U. S. 639. It is no part of the legislative function to adjudicate guilt. Legislatures enact laws; courts and courts

alone try supposed disobeyers. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Opp Cotton Mills* v. *Administrator of Wage and Hour Division*, 312 U. S. 126, 145. Our system of law is Constitutionally predicated upon keeping separate the two functions. Articles I and III, United States Constitution; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190-191.

True, both courts and legislatures often must make inquiry into facts and reach findings and conclusions respecting the same. But they do so for very different purposes, and by token of their different purposes can and do utilize dissimilar procedures and different kinds, qualities and degrees of evidence and proof. It mistakes the respective functions of the two branches of government to assume that a matter "found" by one may properly be given consequence within the processes and for the purposes of the other. The character of the "hearing" which precedes a "finding" "must be adapted to the consequences that are to follow." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 319. See also *Prentis* v. *Atlantic Coast Line Co., supra*, at p. 227.

Indeed, a legislature may not even make an investigation, let alone make effective findings, where the object being pursued lies exclusively within the judical as distinguished from the legislative area. Witness the below excerpt from the *Kilbourn* opinion:

> "What was this Committee [a certain Congressional investigating committee] charged to do? To inquire into the nature and history of the real estate pool. How indefinite! What was the real estate pool? Is it charged with any crime or offense? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government? Here, again, the courts, and they alone, can afford a remedy."—103 U. S. 168, 195.

The foregoing principles are at the root of the specific Constitutional prohibition against Bills of Attainder. The essential vice of such legislative acts is that in them "the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; . . ." *Cummings* v. *Garland*, 71 U. S. 277, 323.

Because legislatures have no lawful authority to act as judges, neither Congress nor any other legislature may by any law or legislative "finding" determine that John Doe, by name, nor all or any of the members of the "X" organization or of any other identifiable group, have violated any general law or other standard of conduct or are to be jailed, fined, deported, registered, or subjected to "security detention" or to any other civil or criminal consequence.

> "For example, it is clearly within the power of the Legislature to determine as a fact that, in the public interest, all diseased cattle should be destroyed, but it is not within the legislative power to determine that John Smith's cattle are diseased. So, while it was clearly within the legislative power to determine that, in the public interest, any party advocating the forceful overthrow of the government of the United States should be denied a place on the ballot, it is not within the power of the Legislature to determine that the Communist Party advocates the doctrine in question." *Communist Party* v. *Peek*, 20 C. (2d) 536, 549.

V.

The Statute Does Not Authorize the Imprisonment Sustained Below; If Construed and Applied So to Do the Statute Would Violate the First Amendment Securing Freedom of Speech, Press, Thought, Association and Assembly.

As noted in the Statement of the Matter Involved, *supra*, the only individual acts on petitioners' part of which

the respondent District Director made complaint below and upon the basis of which he purported to defend and justify his confinement of them, were that they wrote articles, uttered speeches and attended and participated in public meetings affecting subjects and ideas of which he and the Attorney General disapproved.

If the statute here concerned be construed to sustain the Attorney General in claiming power to so confine petitioners, the statute as construed and applied violates the First Amendment. To tolerate power in the Attorney General through his bail discretions to threaten or impose confinement for speech of which he disapproves would sanction a precedent for censorship by fear and coercion:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." —*Thornhill* v. *Alabama*, 310 U. S. 88, 97-98.

In sustaining petitioners' confinement the Court below noted that petitioner Carlson had written an article for a newspaper characterized by the Attorney General as the "'Daily People's World' (official West Coast organ of the Communist Party)" which bore material strongly critical of American foreign policy in Asia and "highly praising Communist China".

But freedom to criticize governmental policies, even those relating to war and peace, is bred of the heart of liberty of speech. The Attorney General, with the sanction of the Court below, would cast petitioners in jail simply for expressing such dissident ideas as that capitalism is unjust or the present government's foreign policy unwise. He

would do so upon the premise that where speech reaches questions so basic as these, suppression is warranted.

This reasoning misconceives Constitutional democracy in whole. It is precisely the most critical speech which it is most vital to society to preserve. It is within the area where criticism is sharpest and government most sensitive, where debate surges pro and con over the most crucial issues and questions, such as war and peace, alterations of governmental structure or proposals for great societal changes—it is within this area that unshackled speech is most precious and vital. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642.

In our system of government it is the people who act as the arbiters of all policy. For their participation in the arena of speech and opinion, wherein is resolved all ultimate societal decisions, they are and can be subject to no pain, penalty or punishment by act of government.

The Attorney General would jail ideas and close the door on freedom of speech. To uphold in him a power to so act would destroy free government, for, in the words of this Court,

> "When that door is closed, it closes all doors behind it." *Pennekamp* v. *Florida*, 328 U. S. 331, 350.

Conclusion

WHEREFORE petitioners pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted, and that, in light of the gravity of the questions herein raised and the special circumstances attending the instant case, a speedy determination of the issues herein raised be had before, if possible, the expiration of the October, 1950 term.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11312

JOHN ZYDOK,

Appellant,

v.

JAMES W. BUTTERFIELD, Director of the Immigration and Naturalization Service, Detroit, Michigan,

Appellee

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

Decided March 26, 1951

Before HICKS, Chief Judge; ALLEN and MILLER, Circuit Judges.

HICKS, Chief Judge. Appeal from an order of the district court dismissing a writ of habeas corpus.

Appellant, John Zydok, an alien, entered the United States in 1913. He was arrested in August, 1949 upon a warrant issued by the Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service of the United States Department of Justice. The warrant charged that he was found in the United States in violation of the Immigration Laws. The specific charge was that he was a member of an organization that advised, advocated or taught the overthrow, by force or violence of the Government of the United States; and which wrote, circulated, distributed, printed, published or displayed written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government.

Appellant was released under bond in the sum of $2,000.00. The condition of the bond was that appellant "shall be produced when required for a hearing or hearings

in regard to the charge upon which he has been taken into custody, and for deportation if he should be found to be unlawfully in the United States." 8 USCA, Sec. 156 (Sec. 20 of the Immigration Act of 1917).

Following appellant's arrest, a deportation proceeding was instituted against him before the Immigration and Naturalization Service at Detroit, Mich., to determine the deportability of appellant and this proceeding was pending when appellant was again arrested on October 23, 1950. His rearrest was based upon the following provision of Sec. 23 of the Internal Security Act of 1950, to wit:

> "... Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole,"

and was without warrant. He was held in prison without bail; hence the writ of habeas corpus.

The pertinent question here is, whether the Attorney General abused his discretion in causing appellant to be held without bail.

It is undeniably true that appellant was, before his original arrest, a member of the Communist Party and was financial secretary of the Hamtramck Division of the Communist Party of Michigan for the year 1949 and that as such secretary he assisted in the collection of funds to be used in the defense of the Communist Party leaders who were tried and convicted in New York under the Smith Act (18 USC, Sec. 2385) of conspiring to advocate the overthrow of the Government and that the United States Department of Justice had information to that effect when appellant was rearrested. If in the exercise of sound judgment upon whether appellant should have been continued in custody, or have been released on bail, the Attorney General was limited to a consideration of the undisputed fact that appellant was a Communist, little may be urged

against his decision in view of the preamble to the Internal Security Act of 1950. But we think that in determining whether appellant should have been granted or denied bail the Attorney General had a much wider latitude for decision.

Discretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision in view of all the attending circumstances. *The Styria, Scopinich, Claimant* v. *Morgan,* 186 U. S., 1, 9. There are many circumstances which involve decision.

Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army.

Before his second arrest and while he was at large on bail he reported regularly to the Department of Immigration and Naturalization Service. The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities. The fact that he assisted in collecting funds for the aid of the Communist defendants being tried under the Smith Act can hardly be regarded as an objection to the allowance of bail, for these defendants themselves were allowed bail after the affirmance of their convictions and even during the pendency of their appeals. *Williamson, et al.* v. *United States,* U. S. Supreme Court, Law Ed. Advance Opinions, opinion by Mr. Justice Jackson, Nov. 20, 1950, pending certiorari.

The deportation proceedings against appellant have been pending since October, 1949 and there is no indication of an early termination thereof. In the meantime appellant is confined in jail.

The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

The district court seemed of the opinion that it was the duty of appellant to make such clear and convincing showing as would justify it in holding that the Attorney General or his subordinates had gone beyond the limit of sound discretion in denying bail and the Court found that as a witness appellant had ample opportunity to testify that he was not a member of the Communist Party or a part of the Communist movement at the date of his last arrest. While on the witness stand appellant claimed his conditional privilege against self-incrimination and upon that ground declined to testify touching his Communistic relations. We think that his refusal to so testify should not have operated against him. *Blau* v. *United States,* decided by the Supreme Court on Dec. 11, 1950.

We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount. This view is more nearly in accordance with the spirit of our institutions as it relates even to those who seek protection from the laws which they incongruously seek to destroy. See *Carson* v. *Landon, Dist. Director, etc.* (CCA 9), decided Dec. 16, 1950; *United States* v. *Dist. Director, etc.,* 169 Fed. (2d) 747, 752 (CCA 2).

The result is that the order dismissing the writ of habeas corpus is reversed and the case remanded to the district court with directions to proceed in accordance with the views herein expressed.

Reversed.

Filed March 26, 1951. John W. Menzies, Clerk.

APPENDIX "B"

DISTRICT COURT DECISIONS AFFECTING REVOCATION OF BAIL IN DEPORTATION PROCEEDINGS KINDRED IN CIRCUMSTANCES TO THE CASE AT BAR.

CHICAGO, ILL.—Judge James Campbell. Cases: Vincent Andrulis, James Keller, Moses Resnikoff. (Released on original bail.)

CHICAGO, ILL.—Judge Walter LaBuy. Cases: Peter Kushnir, Fred Licheta. (Released on original bail.)

CLEVELAND, OHIO—Judge Emerich B. Freed (N. D. Ohio). Cases: David Schlossberg, No. 27805; Joseph Lukas, No. 27806. (Released on original bail.)

DALLAS, TEXAS—Judge William H. Atwell (N. D. Tex.). Case: Jose Estrada, No. 4125. (Released on original bail.)

DETROIT, MICH.—Judge Arthur Lederle (E. D. Mich.). Case: James Papandreau, No. 9908. (Released on original bail.)

DETROIT, MICH.—Judge Arthur Koscinski (E. D. Mich.). Case: Henry Podolski, No. 9884, *Podolski* v. *Baird*, 94 Fed. Supp. Adv. Ops. 294. (Released on original bail.)

DULUTH, MINN.—Judge Dennis Donovan (D. Minn.). Case: Knut Heikkinen, No. 1101. (Released on bail pending appeal.)

HAMMON, IND.—Judge Luther Swygert. Case: James McKay. (Released on original bail.)

MINNEAPOLIS, MINN.—Judge Gunnar Nordbye (D. Minn.). Case: Peter Warhol, No. 3517, *Warhol* v. *Shrode, et al.*, 94 Fed. Supp. Adv. Ops. 229. (Writ granted. Bail increased from $1,000 to $2,500.)

MILWAUKEE, WIS.—Judge Robert E. Tehan (E. D. Wis.). Cases: James Hilty, Nick Stess. (Released on original bail.)

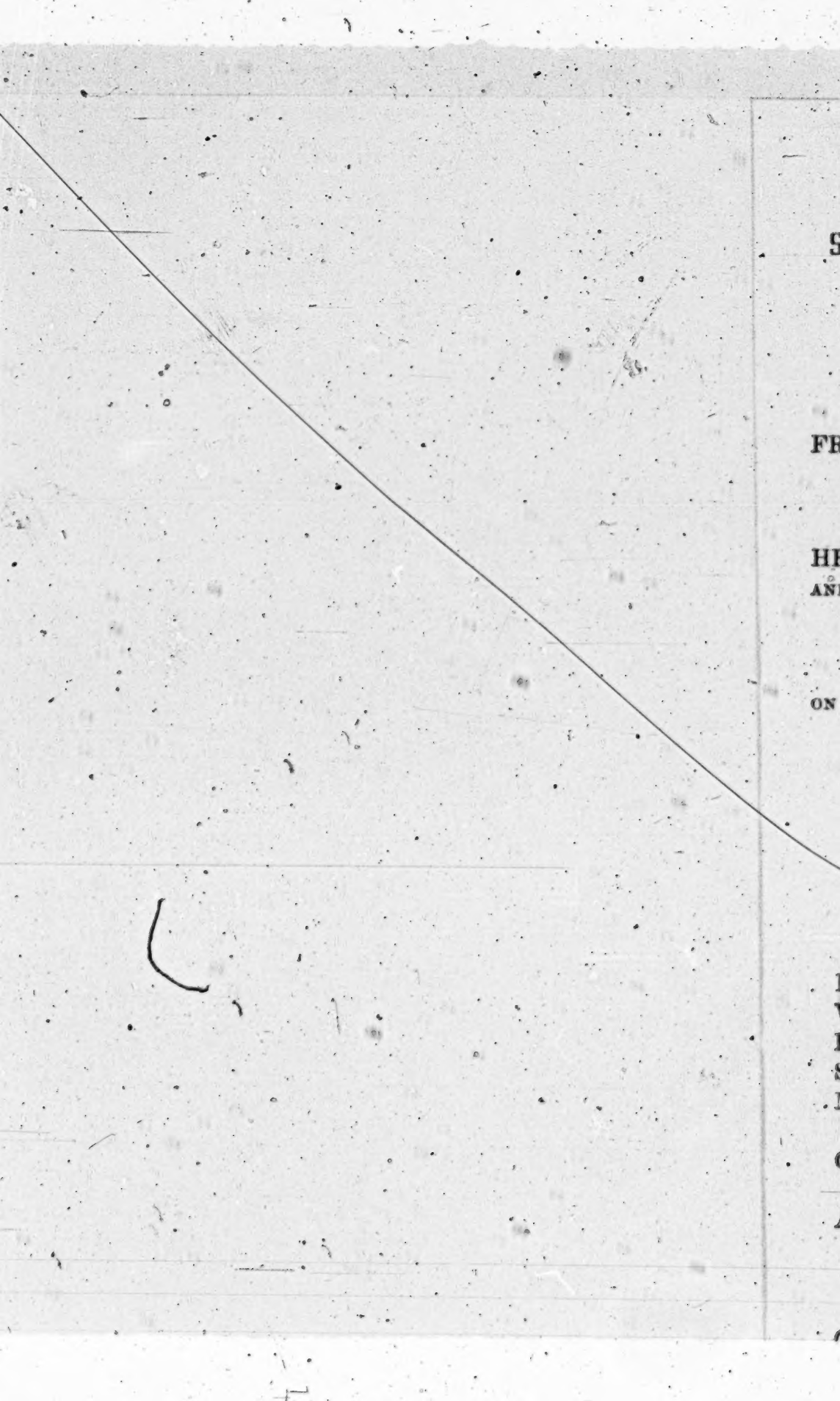
NEW YORK, N. Y.—Judge Sylvester Ryan (S. D. N. Y.). cases: Frank Borich, and 15 others, *United States, ex rel. Klig, et al.* v. *Schaughnessy*, 94 Fed. Supp. Adv. Ops. 157. (Released on original bail.)

PITTSBURGH, PA.—Judge Owen M. Burns (W. D. Pa.). Case: Vincent Kemenovich. (Released on $10,000 bail pending argument on writ.)

ST. LOUIS, MO.—Judge Rubey M. Hulen (E. D. Mo.). Case: Antonio Sentner, No. 7573. (Released on original bail.)

SAN FRANCISCO, CAL.—Judge Michael Roche (N. D. Cal.). Cases: William Heikkila, No. 30126; Ernest Fox, No. 30115; Nat Yanish, No. 30114. (Released on original bail.)

SEATTLE, WASH.—Judge John Bowen (W. D. Wash.). Cases: Ernest Mangoang, No. 2640; Boris Sassief. (Released on original bail after remand.)



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UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

ANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,
Petitioners,

vs.

RMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

VRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,
Petitioners,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

BRIEF FOR PETITIONERS

This case is here on Writ of Certiorari allowed by an order filed October 8, 1951 (R. 353)[1] to review the decisions and judgments of the United States Court of Appeals for the Ninth Circuit, rendered March 13, 1951 (R. 350-3), affirming in a single opinion orders of the United States District Court in and for the Southern District of California, Central Division, rendered January 22, 1951 (R. 65-6; 107-8; 144; 175-6), denying petitioners' respective petitions for habeas corpus theretofore issued.

Opinions Below

The cause herein was before the District Court and the Court of Appeals upon two occasions. The initial opinion.

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[1] Meaning, Transcript of Record, pages 350 to 353, inclusive.

of the District Court (R. 18) is reported in *Ex Parte Carlson*, 94 F. Supp. 18. The initial opinion of the Court of Appeals (R. 28; 111; 149; 180) is reported in *Carlson* v. *Landon*, 186 F. (2d) 183; related case, *Mangoang* v. *Boyd*, 186 F. (2d) 191. The District Court filed no written opinion in rendering its second judgment (R. 65-6; 107-8; 144; 175-6). The second opinion of the Court of Appeals (R. 331) is reported in *Carlson* v. *Landon*, 187 F. (2d) 991.

Jurisdiction

The judgments of the Court of Appeals were rendered and filed March 13, 1951 (R. 350-3). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101 (c).

Statute Involved

The statute involved is section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 8 U. S. C. 156 (a)), as amended by section 23 of the Internal Security Act of 1950 (Pub. Law 831, 81st Cong. 2d Sess., 64 Stat, —). In material parts the statute, as amended, provides as follows:

> "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody, or (2) be released under bond in the amount of not less than $500.00, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole that the alien shall be producted, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made."

Statement of the Case

These are habeas corpus proceedings. Petitioners are aliens, arrested in deportation proceedings October 21, 1950[2] and detained in custody and denied bail by the respondent District Director of the United States Immigration and Naturalization Service, Department of Justice, upon the order of the acting Commissioner of Immigration and Naturalization as delegee of the Attorney General (R. 42; 91; 132; 162).

Previously, between October, 1947 and June, 1950, on dates not related to one another, deportation proceedings were initiated against each of the petitioners by service upon them of warrants of arrest charging each with being

> ". . . an alien who is a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow by force or violence of the Government of the United States, in violation of the Act of October 16, 1918" (R. 45; 94; 134-5; 165).

Each of the petitioners was then admitted to bail under the former statute, the sums fixed varying between $1000.00 and $5000.00 (R. 45; 95; 135; 166). Each of the petitioners complied faithfully with all terms of his bond. It is undisputed by the respondent that each petitioner

> ". . . at all times . . . has been, now is, and will continue to be, available to appear and will appear at any and all hearings and other lawful proceedings in connection with the determination of his deportability;" (R. 5-6, 49; 73, 79; 156, 170; semble 115-6, 139).

On October 21, 1950, respondent caused petitioners Carlson, Carlisle, Hyun to be rearrested upon the original warrants notwithstanding their record of obedience to bail

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[2] October 23, 1950 in the case of petitioner *Stevenson*.

(R. 4, 117, 154) and from that date until their release by this court pending certiorari proceedings, detained them absolutely and without right to bail in any amount (R. 5; 117; 156). On October 23, 1950, respondent similarly arrested petitioner Stevenson (R. 71-2) and thereafter confined her without bail like the others.

Petitioners filed their respective petitions for habeas corpus below on October 24, 1950, and writs were issued by the District Court.

On October 31, 1950 respondent caused each of petitioners to be served with new warrants of arrest, charging each petitioner to be deportable on the ground of being

> ". . . after entry . . . an alien who was a member of the Communist Party of the United States of America;" (R. 4; 72; 117; 155).

This change in the warrant charge rendered the original writs technically moot. Accordingly, petitioners filed new petitions November 2, 1950 and new writs issued. Thereupon, in answer to the issued writs, respondent filed returns in each of the proceedings, justifying his detention of each of petitioners upon the ground in each instance

> "That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 11; 79; 125).

The District Court held this justification sufficient and discharged the writs (R. 24; 86), filing a written opinion (R. 18). Upon appeals from those orders the Court of Appeals, in its first decision herein, 186 F. 2d 183, held the returns insufficient as a matter of law and remanded for further proceedings (R. 28; 111; 149; 180).

Thereafter, the respondent filed in each case a new return (R. 40; 89; 130; 160) with an annexed affidavit (R.

45; 95; 135; 166) and, after traverse, a supplemental return (R. 55; 99; 139; 171). In these returns and affidavits the District Director justified his incarceration of petitioners upon the ground that he possessed evidence tending to establish that they were members of the Communist Party of the United States.

As to each petitioner the respondent set forth in an affidavit, executed by him and attached to his return, a recital of information he claimed to have as to statements, speeches, publications and attendance at or participation in meetings by each petitioner, in each instance affecting and relating to either the Communist Party or other organizations "designated by the Attorney General as Communist", including the Civil Rights Congress, the American League for Peace and Democracy, the People's Educational Center, the League of American Writers and the American-Russian Institute. As to petitioners Stevenson, Hyun, and Carlisle, these activities were past only, the most recent in date being in the year 1948 as to petitioner Stevenson, and 1949 as to both petitioners Hyun and Carlisle.

Upon the basis of these activities on the part of each petitioner, summed up in the concluding sentence in each of the returns as "tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party", the Acting Commissioner of Immigration and Naturalization for the Attorney General, concluded as to each petitioner

> "that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 44; 93; 133; 164).

The District Director in his return and affidavits made no claim whatever of the commission of any unlawful act by any of the petitioners. He did not dispute that while at

liberty under bond each had always appeared when required in the deportation proceedings and, if enlarged, would continue to be available and answerable.

The District Court, this time without written opinion, again held the District Director's justification sufficient, denied each of the petitions for habeas corpus and discharged each of the writs (R. 65; 107; 144; 175).

Upon appeal the court below affirmed. It ruled that while the statutory power of the Attorney General to grant or withhold bail pending deportation was not an arbitrary or unreviewable power, it was not limited to the object of securing the appearance of the alien in the deportation proceeding but included the authority claimed by the Attorney General to imprison for "protective custody purposes". It held that petitioners might be taken upon the record to be members of the Communist Party and that the Attorney General without other proof might hold them in detention without bail upon that ground alone. This ruling it justified upon "the legislative findings set out in the Internal Security Act of 1950," supplemented by judicial notice.

Summary of Argument

Petitioners contend (1) that the refusal of bail to them, upon the record here, was arbitrary and capricious, and deprived them of their liberty without due process of law; (2) that Sec. 20(a) of the Immigration Act of 1917, as amended, is a bail statute, and the denial of bail to petitioners where their availability in the deportation proceedings was not in dispute was an abuse of the discretion vested in the Attorney General by the statute and a denial of their right to reasonable bail under the Eighth Amendment to the Constitution.

I. Denial of Bail to the Petitioners, upon the Record Here, Was Arbitrary and Capricious and Deprived Them of Their Liberty Without Due Process of Law.

In this case, the Attorney General[3] rearrested these petitioners and held them without bail pending deportation proceedings upon the ground—and only upon the ground—that he had in his possession evidence "tending to establish" each petitioner's "current affiliation with and activity on behalf of the Communist Party" (R. 44, 93, 134, 164). We argue below that, under the applicable statute and the Eighth Amendment to the Constitution, refusal of bail upon any ground other than fear of the alien's non-appearance in the main proceeding is unauthorized and violative of constitutionally protected liberties. Even assuming, however (as we do only for purposes of argument), that consideration of factors other than answerability was permissible, we submit that the imprisonment of petitioners upon the record here was an act of capricious and unconscionable tyranny. The time has not yet come, we believe, when any person—citizen or alien—can be thrown into jail and held without right to bail merely because he is, or is thought by an administrative officer to be, a Communist, a Republican, an atheist or a technocrat. See *U. S. ex rel. Potash* v. *District Director* (C. C. A. 2, 1948), 169 F. 2d 747; *U. S. ex rel. Pirinsky* v. *Shaughnessy* (C. C. A. 2, 1949), 177 F. 2d 708.

As this Court has indicated on numerous occasions, aliens under the Constitution have the same rights, liberties and protections which citizens have except that aliens, unlike citizens, may be held liable to deportation. The foreign-born are entitled to the safeguards of the Constitution and

[3] In this brief the respondent is variously and interchangeably referred to as the Attorney General since the former is the ultimate delegee in the chain of authority extending from the Attorney General down through the Commissioner of Immigration and Naturalization to the district director. 8 U.S.C. secs. 101, 102; 8 C.F.R. 150.6.

to the protection of the laws in regard to their rights of person and of propery. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the seal of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Ex parte, Milligan,* 4 Wall. (U. S.) 2, 120.

Aliens thus are persons within the meaning of the Constitution and secured of all rights not limited explicitly to citizens. *Bridges* v. *California,* 314 U. S. 252; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Schneiderman* v. *U. S.,* 320 U. S. 118; *Bridges* v. *Wixon,* 326 U. S. 135, 148. See also, Note, 68 L. Ed. 255, 270. In a nation of immigrants it would be anomalous if the foreign-born should not enjoy the very liberties for which the earliest comers established a home here. While they have not always been welcomed, as the scheme of our immigration laws reminds, once domiciled here the alien may lay full claim to the benefits of most of the guarantees of the Bill of Rights.

This Court has uniformly held that proceedings which seek the deportation of aliens must conform to the due process requirements of the Fifth Amendment to the Constitution of the United States. To hold otherwise would indeed violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 105.

The reasons for this requirement lie in the drastic character of expulsion from one's adopted home. This Court has repeated on a number of occasions the seriousness with which it views "the doom of deportation" for those whose lives have been intimately tied to this country. It has described deportation as the loss "of all that makes life worth living", *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; as

"the equivalent of banishment or exile", *Delgadillo* v. *Carmichael,* 332 U. S. 388, 391; as "the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10. See also *Bridges* v. *Wixon,* 326 U. S. 135, 147.

Thus where, in a deportation proceeding, the evidentiary rules of procedure were disregarded by administrative officials so as to make the proceedings essentially unfair, this Court held that the deportation order could not stand under the Fifth Amendment. *Bridges* v. *Wixon,* 326 U. S. 135, 150. And, in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, this Court stated (page 50):

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberties and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself, it might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

Due process of law, "representing a profound attitude of fairness between man and man, and more particularly between the individual and govt," Mr. Justice Frankfurter, concurring, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 95 L. Ed. (Adv. Ops.) 556, rejects the thought that any person, alien or citizen, may be subjected to the dictate of the executive.

> "This court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental

principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *The Japanese Immigrant* case, 189 U. S. 86, 100-101.

If the requirements of procedural due process must be met in any deportation proceeding, can it be doubted that the denial of freedom upon reasonable bail to a person pending deportation hearing falls within the purview of the same constitutional interdiction, especially when such is grounded upon arbitrary assumptions reached ex parte? It is manifest that Congress may not constitutionally delegate such unbridled power to any official of government. The alleged plenary power of Congress with respect to the deportation of aliens does not include the power to deprive aliens arbitrarily of their liberty. Certainly, lawful powers may not be used for unconstitutional ends. *Lake Shore* v. *Smith*, 173 U. S. 684, 689; *United States* v. *Butler*, 297 U. S. 1, 68; *Western Union Telegraph Company* v. *Foster*, 247 U. S. 105, 114.

It is maintained, however, that the discretion to grant or deny bail under the law as applied here rests upon a special foundation. We are told that the justification for refusal of bail in this case, incarcerating the petitioners here for a period of indefinite duration, is to protect the "national security." It is not contended, therefore, that the discretion of the Attorney General has been exercised to subserve the purpose of bail in its traditional sense. What has been done here is to use a statute dealing with bail as a means of imprisoning persons who are alleged by an executive officer to be aliens and members of the Communist Party. It is respectfully submitted that this action of an executive officer does violence to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U. S. 312. Compare *Palko* v. *Connecticut*, 302 U. S. 319:

"For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. *Hopkins* (1883), 118 U. S. 356, 370.

In the proceedings here the Attorney General has taken a bail statute and applied it in such a manner as to arbitrarily deprive these petitioners, as a class, not only of their employment (*Truax* v. *Raich*, 239 U. S. 31) but of their liberty as well. It is doubtful that the Attorney General would contend that any arm of government would have the right to deny bail to any citizen, in criminal or civil proceedings, upon the sole claim that he is asserted to be a member of the Communist Party and as such, a danger to "national security." But if the statute should be construed as respondent argues, then there are no bounds to his discretion and he could exercise this awesome power for political purposes or upon mere whim and caprice. It is not too much to say that if such a result were reached, it would place an executive officer in a position above government and the Constitution itself. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220.

The terms of the statute, as we will show below, do not purport to vest any such arbitrary power in the Attorney General. It is the Attorney General himself who has so construed the law as to include the power to detain aliens allegedly members of the Communist Party for "security purposes". In order to support this arrogation of authority the Attorney General points to the "legislative findings"

of the Internal Security Act of 1950. But the constitutionality of the Internal Security Act is not before the Court in this present proceeding. No deportation order under that Act is involved in these proceedings. On matters involving the constitutionality or validity of statutes enacted by the legislature, courts often do search for legislative intent, but the determination of a judicial question is dependent upon a hearing and evidence adduced before the body which is making the judicial determination. The Attorney General is vested, under the plain terms of the law, with a discretion to determine to grant or deny bail in the light of the common law principles and facts relating to the particular individual involved. The fact that a legislature has conducted an investigation and allegedly found facts to warrant the enactment of a law does not justify a court or administrative official arbitrarily depriving a person of his liberty without facts personal to the individual and in violation of freedoms secured by fundamental principles of law. See *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Morrison* v. *California*, 291 U. S. 82; *Tot* v. *U. S.*, 319 U. S. 463.

As this Court stated in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . .
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> "The nature of the final act determines the nature of the previous inquiry. As the judge, bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the

practical sense, although the questions considered might be the same that would arise in the trial of a case."

See also *Tot* v. *U. S.*, supra, *Morrison* v. *California*, supra. Here, without the facts and solely upon the basis of "legislative findings", an administrative official has deprived persons of bail in the face of a clear showing of their right to it, under color of a phrase, "national security". If this can be done by the executive arm of the government exercising the judicial function of granting or denying bail, then the constitutional provision which forbids the deprivation of a person's liberty without due process of law will become a dead letter. The power of the courts to protect citizens and aliens alike from invasions of their constitutional rights will be clearly ended, for the precedent once established will mean that governmental action, no matter how arbitrary, can always be sustained upon the basis of "legislative findings". Thus, that which the statute makes discretionary would be converted into an automatically preordained result predicated on legislative fiat.

If under the law bail can be denied at all, denial in any case must be founded upon evidence of material facts relating to the particular alien. The legislative finding constitutes no evidence of what any individual alien did. At most, the legislative findings may be referred to for guidance in resolving ambiguity. But here they are treated as findings of fact and applied against the petitioners as individuals. Thus, to deny bail upon the legislative findings in this case is to base the denial upon the assumption that the charges against the petitioners are true. The petitioners are thereby placed in the position of having to prove falsity of the charges in order to secure their release on bail for the purpose of preparing for the hearing of those charges.

This is a case involving the right to bail of four human beings. It affords no proper occasion to classify them as members of a particular group. To condemn them by branding the group without notice or proof is tyrannous.

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Joint Anti-Fascist Refugee Committee v. *McGrath*, 95 L. ed. 556 (Frankfurter, J., concurring).

This Court has recently declared that "... one may not be imprisoned or executed because he holds particular beliefs." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 408. *United States ex rel. Potash* v. *District Director*, supra, 169 F. 2 747; *United States ex rel. Pirensky* v. *Shaughnessy*, supra 177 F. 2 708. Yet it is solely for their claimed political beliefs that these petitioners were imprisoned. All of their specific activities, relied upon by respondent as justifying imprisonment—speeches, writings, participation in meetings—were expressions of their beliefs. These are protected by the First Amendment and thus removed from scrutiny or consideration by the Attorney General as factors bearing upon petitioners' right to bail. *Williamson* v. *United States*, 95 L. ed. (Adv. Ops.) 10; *Bridges* v. *United States*, supra, 184 F. 2 881.

Tested by his own premises, therefore, the action of the Attorney General in this case defies both reason and fairness. Whatever the limits of his discretion in this matter, it is a discretion that has been given him, not an autocratic power. Discretion, at the minimum, means the exercise of authority "in a reasonable manner to attain a legitimate end." See *Federal Radio Commission* v. *Nelson Bros.*, 289

U. S. 266. But no rational relation has been shown or can be found between the circumstances of these petitioners and their *sine die* imprisonment. It is submitted that the refusal of bail here was a gross abuse of any granted power.

II. Sec. 20 (a) of the Immigration Act of 1917, as Amended, Is a Bail Statute, and the Denial of Bail to These Petitioners Where Their Availability Was Not in Dispute, Was an Abuse of the Discretion Vested in the Attorney General by That Statute, and a Denial of Their Right to Reasonable Bail under the Eighth Amendment to the Constitution.

The right to bail, protecting the liberty of the accused during any proceeding against him, expresses the deep abhorrence of our law for all imprisonment not adjudged as punishment. Devised as a means of securing the presence of the party at the principal proceeding, (*Ex parte Milburn*, 9 Pet. (34 U. S.) 704), bail is favored at all stages of the case.

It is a principal buttress of the right of every person to the fullest opportunity to defend himself and to be presumed innocent until the due processes of the law prove otherwise.

> "The presence of bail before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect."
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> *U. S. ex rel Rubinstein* v. *Mulcahy*, (C. C. A. 2, 1948), 153 F. 2nd, 1002, 1004.

Bail thus is ancillary to the main proceeding, designed to facilitate and effectuate it. Like property attachment, which gives way upon the posting of proper bond, bail is an essentially mechanical arrangement made to secure a mechanical end—the availability to process of the personal

subject of the action. Its role is the same in civil and criminal proceedings. Cf. 11 U. S. C. A. sec. 28 (distraint of bankrupt). Its prime purpose always is to preserve liberty.

A. *Background of the Present Statute*

Until 1907 the statutes dealing with expulsion of aliens contained no express provision for allowance of bail in deportation cases. Some courts did find in an earlier act prohibiting bail specifically in Chinese exclusion cases[4] strong implication of the intention that bail should be available in other types of immigration cases (*Ex parte Ah Tai*, D. Mass., 1903, 125 F. 795). Most courts, however, required more explicit evidence that Congress desired to authorize bail pending deportation. See *U. S. ex rel Carapa* v. *Curran* (C. C. A. 2, 1924), 297 F. 946. So doubtful was the majority that they declined to assert any power in the courts themselves to admit to bail in habeas corpus proceedings brought by aliens held for deportation, notwithstanding the lead given by *Wright* v. *Henkel*, 190 U. S. 40; *Chin Wah* v. *Colwell* (C. C. A. 9, 1911) 187 F. 592.

More than ordinary significance attaches, therefore, to the inclusion of express authority for allowance of bail in expulsion proceedings in sec. 20 of the Act of February 20, 1907 (34 Stat. 898, 904-5). The provision was as follows:

> "Pending the final disposition of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States."

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[4] Act of May 5, 1892; Comp. St. sec. 4319.

Its obvious purpose was to permit the alien's release on such terms as would insure his appearance at the administrative hearings and his availability for ultimate deportation. The plain intent of the legislation was to provide for acceptance of appropriate security in lieu of even "temporary confinement" pending expulsion proceedings, in accordance with the traditional practice in criminal cases.

Ten years later, this original bail statute was re-enacted without change as a part of sec. 20 of the Act of Feb. 5, 1917 (39 Stat. 890). Since this measure constituted a major codification of the immigration laws and the principal deportation statute, inclusion of the bail provision evidenced a purpose that no alien in any deportation proceeding should be kept in custody if he could furnish satisfactory security for his appearance.

The bail provisions of sec. 20 of the 1917 Act were never considered by this Court prior to their amendment on September 23, 1950 by sec. 23 (a) of the Internal Security (McCarran) Act (Pub. Law 831, 81st Cong. 2d Sess., c. 1024). Indeed, from the small number of cases involving application of the provisions, it may be assumed that bail was ordinarily allowed in deportation cases as a matter of course.

In *Prentis* v. *Manoogian*, (C. C. A. 8, 1926) 16 F. 2d 422, a Circuit Court of Appeals construed the bail proviso for the first time. There an alien was held by the Secretary of Labor without bail pending disposition of expulsion proceedings against him. The Secretary justified upon the ground that no inherent right to bail exists in such proceedings, independently of the statute, and that his discretion under the proviso was complete and final. The court agreed to the first proposition but rejected the second. It held that the immigration authorities, under the terms of the statute, had no power to deny bail and that the permissive language of the proviso was for the benefit of the

alien alone. If he chose to invoke it, the court concluded, and satisfied the statutory condition by offering reasonable security for his appearance he was entitled to his liberty as a matter not of inherent, but of statutory, right.

No other case has gone so far. But the two other leading decisions antedating the McCarran amendments, both from the Second Circuit, read the statute as conferring upon the Attorney General (successor to the Secretary of Labor, Reorg. Plan No. V., June 14, 1940, 5 Fed. Reg. 2423) a discretion "to be reasonably exercised" with regard to the circumstances of each case, and on facts closely analogous to those here held denial of bail to be an abuse of discretion. *United States ex rel. Potash* v. *District Director* (C. C. A. 2, 1948), 169 F. 2nd 747; *United States ex rel Firinsky* v. *Shaughnessy* (C. A. 2, 1949), 177 F. 2nd, 708.[5] See also *Zydok* v. *Butterfield* (C. A. 6, 1951), 187 F. 2d 802; *United States ex rel. Heikkinen* v. *Gordon* (C. A. 8, 1951), 190 F. 2nd (Adv. Ops.) 16.

B. *The Statute Requires Release of the Alien On Reasonable Bail Unless his Presence Cannot Be Thus Assured.*

In assaying the scope and operation of the bail power under the deportation statute it is necessary to recall the close correspondence in many important respects between expulsion and criminal proceedings. Not only may deportation result in the loss of "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284. Expulsion proceedings, like criminal, are initiated by the issuance of a warrant of arrest upon probable cause, 8 C. F. R. 150.4. Upon service of the warrant the alien is taken into custody, subject to release on bond in accordance with the statute.

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[5] An earlier decision of that court, *United States ex rel. Zapp* v. *Dist. Dir.* (1941) 120 F. 2nd 762, had rejected the doctrine of *Prentis* but did not decide the nature and extent of the discretion because the issue was not presented.

8 C. F. R. 150.5 (b), 156. Misconduct of some kind is the basis of the charge. The presumption of innocence obtains and the burden of establishing guilt rests upon the government. *Hughes v. Trapello* (C. C. A. 3, 1924) 296 F. 306; *Werrman* v. *Perkins* (C.A. 7, 1935) 79 F. 2d 462. Due process of law must be accorded. *United States ex rel. Tisi* v. *Tod*, 264 U. S. 131; *Wong Yany Sung* v. *McGrath*, 339 U. S. 33; *United States ex rel. Vajtauer* v. *Commissioner of Immig.*, 273 U. S. 103. The alien is entitled to the aid of counsel. *Chew Hoy Quong* v. *White* (C. C. A. 9, 1918) 249 F. 869; *Ex parte Eguchi* (D. C. S. D. Cal., 1932) 58 F. 2d 417. Deportation in every human sense is punishment of the severest character. *Fong Haw Tan* v. *Phelan*, 336 U. S. 6; *Jordan* v. *DeGeorge*, 95 L. ed. (Adv. Ops.) 648.

It follows that the considerations favoring allowance of bail in criminal cases are no less present in deportation. The innocent alien is as much to be protected from imprisonment before trial and decision in expulsion proceedings as in criminal prosecutions; otherwise much of the protection of the presumption of innocence is lost. See *McKnight* v. *United States* (C. C. A. 6, 1902) 113 F. 451; *United States* v. *Motlow*, 10 F. 2d 657. Equally pressing in both classes of proceedings is the necessity for liberty in order to prepare for defense. See *Fong Fook* v. *Wixon* (C. C. A. 9, 1948), 170 F. 2d 245. Equally cogent in both is the interest of the state in minimizing the costs of the proceedings. *State* v. *Reed* (1923), 127 Wash. 166, 219 Pac. 833. The paramount element, common to both, is the right of all persons to their liberty pending appropriate adjudication that misconduct has forfeited it. So long as the state's interest in the availability of the person is properly secured, that right retains its preferred place under our constitutional system.

In this framework, the factors to be considered in allowing bail in deportation proceedings are seen to be similar,

if not identical, to those governing in criminal cases. See Fed. Rules of Criminal Procedure, Rule 46 (c).

> "The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to fredom from unnecessary restraint before conviction under the circumstances surrounding each particular accused. *Moore* v. *Aderhold, Warden*, 10 Cir., 108 F. 2d 729, 731; *Connley* v. *United States*, 9 Cir., 41 F. 2d 49, 50; *Bennett* v. *United States*, 5 Cir., 36 F. 2d 475. Consideration should be given to the seriousness of the crime charged, the past record and recent action of the accused as bearing upon his good faith in appearing for trial and his financial ability to procure bail."
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> *United States ex rel. Rubinstein* v. *Mulcahy* (C. C. A. 2, 1946) 155 F. 2d 1002, 1004.

The court below, however, held that Sec. 20 of the 1917 Act as amended by the McCarran Act permits denial of bail on grounds other than fear of non-appearance. The relatively minor changes in the language of the statute support no such conclusion. By the amendment the discretion of the Attorney General was made explicit and was particularized to include continuation of custody. In his Memorandum for the Respondent In Opposition To Application Before Mr. Justice Douglas For Bail Pending Petition For Writ of Certiorari in this case (p. 5, n. 2), the Solicitor General has suggested that in all probability this was aimed at the ruling of the Eighth Circuit in *Prentis* v. *Manoogian*, supra, 16 F. 2d 422 and disapproves the holding of that case that the bail power of the immigration authorities is limited to determining the amount of the bond. Certainly the new language no more than the old authorizes denial of bail where, admittedly, no fear is claimed that the alien may abscond. It declares merely in plainer terms that bail may be refused in the extreme case where the Attorney General

finds, on evidence, that no bond the alien can furnish will secure his appearance for the deportation proceedings. See *United States ex rel. Heikkinen* v. *Gordon* (C. A. 8, 1951), 190 F. 2d (Adv. Ops.) 16; *Zydok* v. *Butterfield* (C. A. 6, 1951), 187 F. 2d 802.

Sec. 20 thus was and is a bail statute. The authority it grants applies "pending final determination" of deportability and is in aid of that process. It does not, because under our Constitution it could not, authorize whimsical refusal. It permits denial only where the circumstances shown to prevail in the particular case reasonably justify fear that jurisdiction of the alien may be lost. Such circumstances admittedly are lacking here and in their absence petitioner's detention is tyrannous and indefensible.

C. *Denial Of Bail To The Petitioners Under The Circumstances Shown By This Record Was An Abuse Of The Statutory Discretion*

Measured by the underlying purposes of bail, so plainly adopted in the statute, the denial of their freedom to these petitioners, pending their deportation hearings, was arbitrary and tyrannous. Each of them had been previously arrested and released on modest bail fixed by the same agency (R. 45; 95; 135; 166). Admittedly each has an unblemished record of response to every request for his appearance (R. 5-6, 49; 73; 99; 156; 170; *semble* 115-16, 139). Respondent does not claim to fear that they will abscond or fail to hold themselves available to him in the future as they have in the past. He does not claim that any of the circumstances which existed when bond was allowed are different now. These facts alone should be conclusive of their right to release under the statute.

But each of the petitioners is bonded within the respondent's jurisdiction by the strongest human ties. Carlson,

now 37, has lived in the United States since he was six, and in California for the past fifteen years. His petition for naturalization was blocked by the initiation of the deportation proceedings. He is married to a native-born citizen, is the father of two children born in California, and has lived with his family in Los Angeles since 1949 (R. 3).

Mrs. Stevenson was born in England in 1907, migrated to Canada with her family as a child and has lived in this country since 1923. Married to a native-born citizen and the mother of a child born here, she has been a resident of Los Angeles continuously since 1928 (R. 70-71).

Hyun grew up in Hawaii where he was taken by his family from his birthplace in Korea at the age of seven. He attended high school there, with distinction, and was graduated from the University of Hawaii in 1940. Despite the handicap of alienage he became a captain in the University's Reserve Officers Training Corps and president of a fraternity. During the war years, although excluded from military service, he was employed as a civilian worker by the United States Engineer Corps and took active part in civilian defense. Having been married to an American citizen, he came with his wife and their two children to Los Angeles, where he has been continuously employed as an architect and draftsman since 1947. He has twice sought American citizenship, denied because of his Korean birth. (R. 117-19).

Carlisle, like Mrs. Stevenson, is a native of England, born in 1897. He has lived in the United States continuously since 1920, for the past fifteen years in the County of Los Angeles (R. 154).

The petitioners thus are stable and established residents of this country and of the community where they were seized last October. Their average residence here is more than twenty-three years or, if Hyun's years in the Hawaiian

Islands are included, twenty-nine years. All of them have lived in California for substantial periods, fifteen years or more except in the case of Hyun. Three have married and acquired families with whom they are now living. All have been available, without exception, when called by the respondent.

Under these circumstances there is no possible justification for holding these petitioners without bail. The Attorney General asserts the right to confine them in the interest of "national security". But the statute gives him no such authority. It is a bail statute giving only such power as is "necessary to give effect" to the deportation laws (*Wong Wing* v. *United States*, 163 U. S. 228, 235) and no other. It is not a license to the Attorney General to quarantine anyone of whom he disapproves.

D. *Construed Or Applied To Permit Refusal Of Bail Under the Circumstances Here, The Statute Deprives Petitioners of Their Right To Reasonable Bail Under the Eight Amendment.*

It can hardly be contended that petitioners could have been jailed without bail by the Attorney General had they been citizens. The power is claimed, so it seems, solely because they are not. Yet their right to freedom from arbitrary treatment stands no lower in the scale of constitutional liberties than does that of citizens. *Jordan* v. *DeGeorge*, 95 L. ed. (Adv. Ops.) 648; *Bridges* v. *Wixon*, 326 U. S. 135.

> "For the inalienable rights of personal security and safety, orderly and due process of law, are the fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place, or occasion, but belong to man, always, every-

where, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real or assumed, tyrants in all ages have found excuse for their destruction. Without them, democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be vindicated, defended, and maintained in the face of every assault by government or otherwise. All judgments based upon their violation must be set aside."

Ex parte Jackson (D. C. Mont., 1920) 263 F. 110, 113; app. dismissed 267 F. 1022 (C. C. A. 9. 1920)

The Eighth Amendment forbids the exaction of excessive bail not merely from citizens but from all who enjoy the safeguards of the Constitution. It is a limitation upon federal power. See *In Re Kemmler* (1890) 136 U. S. 436. Nor is it applicable in terms merely to criminal proceedings. Its mandate is unqualified. "Excessive bail shall not be required." The reason for its command—to implement due process of law and the presumption that every man is innocent until the contrary has been proved—has equal cogency in relation to deportation cases, where the stakes for the individual are no less high. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6; *Delgadillo* v. *Carmichael*, 332 U. S. 388.

"If, then, it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori it would seem also unlawful to deprive him of his liberty by refusing bail altogether. In the absence of mandatory provisions, such would inevitably be the conclusion of an American court in a justiciable case, if the legal rights or constitutional privileges of an American citizen were involved. This would be true also if in such a case the legal rights of an alien were in issue."

United States v. *Fah Chung* (D. C. S. D. Ga., 1904), 132 F. 109, 110

Recognizing these considerations, more than one court has found in the Eighth Amendmnt a guide to the limits of the bail power under sec. 20 of the Immigration Act of 1917.

Thus in *United States ex rel. Potash* v. *Dist. Dir.*, supra, 169 F. 2d 747, 752, the Court of Appeals for the Second Circuit declared:

> "If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed."

An even clearer statement appears in the opinion of District Judge Ryan in *United States ex rel. Klig* v. *Shaughnessy* (D. C. N. Y. 1950), 94 F. S. 157, 159-60, holding the denial of bail to aliens under circumstances in all respects analogous to those shown by petitioners here to be "arbitrary and an abuse of discretion on the part of the Attorney General":

> "It is not inappropriate to refer here to the Eighth Amendment to the Constitution of the United States, one of that series of amendments collectively known as the Bill of Rights, which prohibits the imposition of excessive bail. *Certainly, the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fall within its scope.* That principle cannot be reconciled with the government's denial of bail to these relators under the circumstances here set forth." (Italics supplied).

The grant of bail is a judicial function, requiring the weighing of fact and circumstances found to bear on the

individual applicant. *United States ex rel. Pirinsky* v. *Shaughnessy* (C. A. 2, 1949) 177 F. 2d. 708. Variations among men being infinite, the complex of ties and interests attached to them is equally various. In the exercise of an informed discretion the bail authority must of necessity take note of these individual differences.

These petitioners, however, of varying backgrounds and social status, are victims of an administrative edict which at one stroke cut off their liberty and that of some two-score others.[6] In each instance the government's justification was a standard form of radiogram message reciting in monotonous refrain:

> "For your information and that of United States Attorneys and aliens and their attorneys the instruction to you of October twenty-first to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued deten-
> (fol.52) tion might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by section nine zero point one of title eight CFR paren twelve fr five zero seven two July thirty one Nineteen Forty Seven paren under section thirty seven of the Alien Registration Act of Nineteen Forty comma eight USC four five eight.") (R. 42-3)

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[6] See Appendix B to Petition for Writ of Certiorari herein, listing other cases in which aliens were arrested, on the same grounds as these petitioners, and denied bail by the Attorney General upon the same grounds.

Here is the negation of discretion, defined as the conscientious application of reasoned judgment to particular facts for a permitted end. Cf. *Fed. Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266. This is administrative fiat, cutting as indiscriminately as a scythe across the myriad circumstances of many lives. Indeed, it is doubtful that the Attorney General troubled to inquire as to the particulars of the individuals who fell in his path. At least in his supplemental returns the district director disclaimed information and belief on this score as to each of the petitioners. (R. 55; 99, 139; 171). Treated arbitrarily as members of a single class, a classification having no bearing on their amenability to the deportation process, the petitioners were swept into jail, anonymous figures in a nationwide "roundup".

> "The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security."
>
> Frankfurter, J., *Joint Anti-Facist Refugee Committee* v. *McGrath*, 95 L. ed. (Adv. Ops.) 556.

Upon this record it is manifest that the Attorney General has turned his bail power against the petitioners in reprisal for what he believes to be their activities and opinions, of which he disapproves. But bail may not be used for punishment, whether on account of expressed views, political activities or otherwise. Mr. Justice Jackson, *Williamson, et al.* v. *United States*, 184 F. 2d 881; *Bridges* v. *United States* (C. A. 9, 1950), 184 F. 2d 886; P. ex rel. *Sammons* v. *Snow*, 340 Ill. 464, 173 N. E. 8, 72 A. L. R. 798; *United States ex rel. Heikkinen* v. *Gordon*, supra, 190 F. 2d (Adv. Ops.) 16.

> "Generally speaking it is not the purpose of the criminal law to confine a person accused of crime before his conviction . . . . Clearly, it is not the function of bail

to prevent the commission of crimes between indictment and trial; and manifestly admission to bail is never a judicial license to continue the commission of crime."

United States v. *Foster et al.*, (D. C., S. D. N. Y., 1948) 79 F. Supp. 422, 423.

Since the purpose of bail is solely to secure the presence of the accused, punitive considerations have no place in the determination as to the grant or the amount of bond. To give them weight is to render the bail *ipso facto* excessive under the Eighth Amendment. Construed as authorizing such practice, the statute here fails the test of that Amendment.

Conclusion

What emerges from the record in this case is an example of discretion abdicated, of power turned to an unauthorized and improper end. Ancient concepts of fairness and historic experience with tyranny alike repudiate the claim that our scheme of law permits it. The Constitution is "more than a silent, anemic witness to this proceeding" (*Bridges* v. *Wixon*, 326 U. S. 135, 159). Both statute and Constitution require that the liberty of these petitioners be restored to them.

Wherefore, petitioners pray that the judgment of the Court below be reversed and that this Court order that petitioners be enlarged upon bail in the sums accepted by the Immigration Service before their rearrest.

Respectfully submitted,

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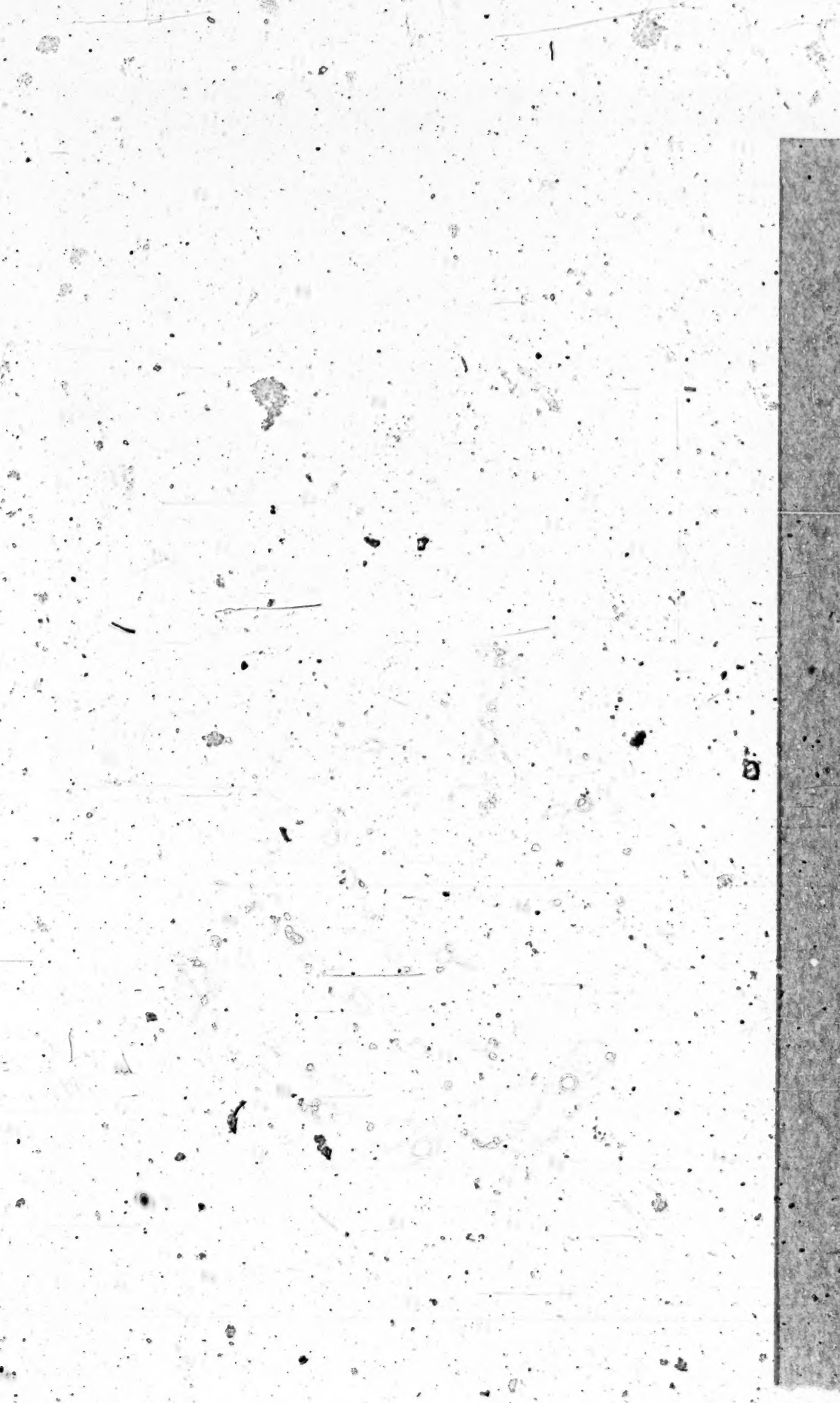

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1951

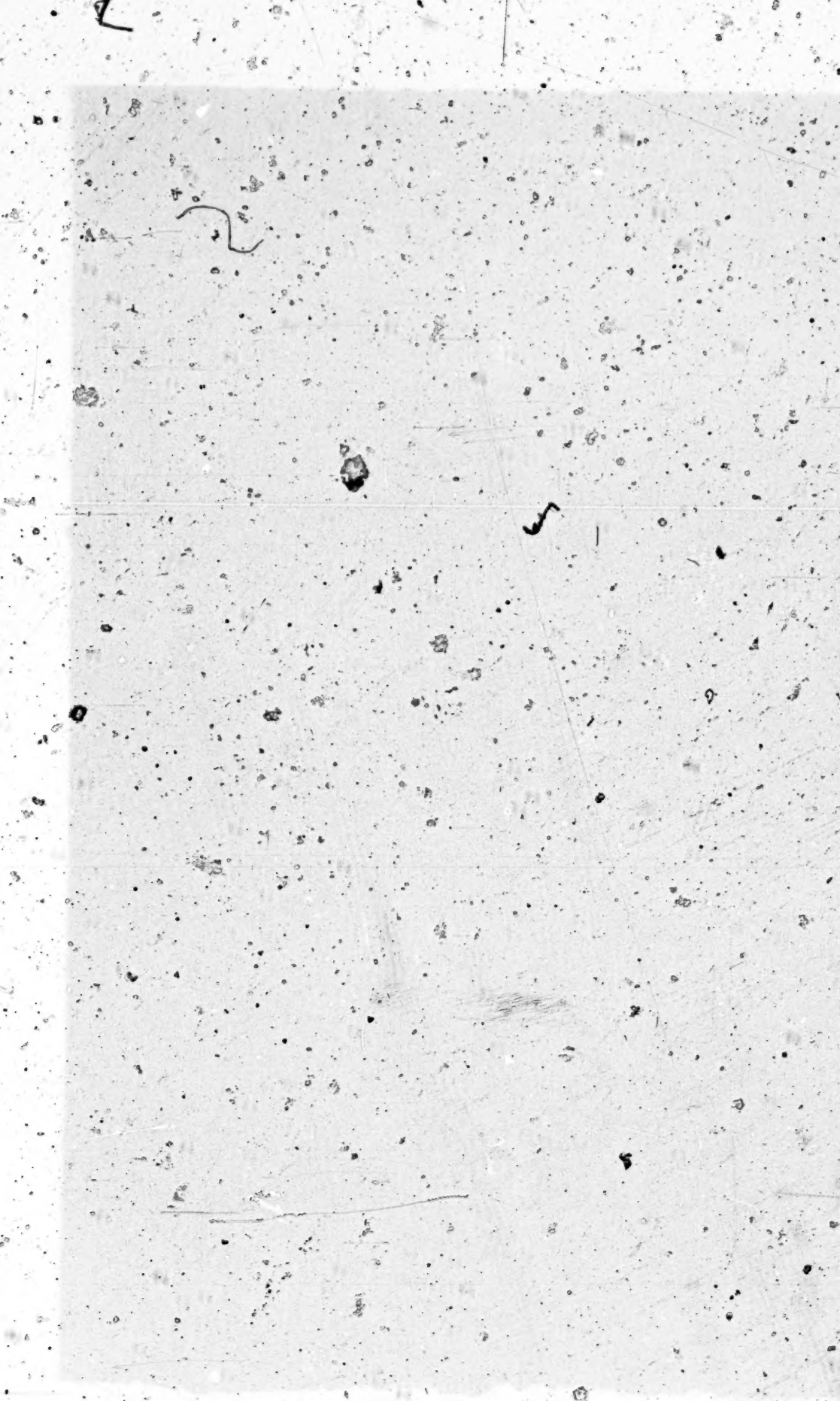
FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT



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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 331–350) is reported at 187 F. 2d 991. The findings of fact and conclusions of law of the District Court appear at pages 60, 103, 140, and 172 of the record.

JURISDICTION

The judgments of the Court of Appeals were entered on March 13, 1951 (R. 350, 351, 352). The petition for a writ of certiorari was filed on April 28, 1951, and was granted on October 8, 1951 (R. 353). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the detention of the petitioners without bail pending the determination of their deportability was authorized by Section 20 (a) of the Immigration Act as amended by Section 23 (a) of the Internal Security Act of 1950.

2. Whether the detention of the petitioners violated their rights under the Eighth or the Fifth Amendment.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for

deportation if an order for his deportation has been made. * * * [8 U. S. C., Supp. IV, Sec. 156 (a).]

STATEMENT

All of petitioners are aliens who, prior to the passage of the Internal Security Act of 1950, had been arrested on warrants of deportation and enlarged on bail pending the determination of their deportability. In each case, the warrant charged that the alien, after entry, was a member of an organization which advocated and taught the overthrow by force or violence of the Government of the United States (R. 45, 94–95, 135, 165), and that each was therefore deportable under the Act of October 16, 1918, as amended (8 U. S. C. 137). Hearings were initiated under these warrants, but (except in the case of Carlisle) were discontinued by the Government and hearings *de novo* ordered as a result of the decision by this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (R. 61, 104, 141).

On September 26, 1950, shortly after the effective date of the Internal Security Act of 1950, the Acting Commissioner of Immigration and Naturalization, in Washington, D. C., requested the District Director in Los Angeles, California, to submit a report covering all aliens in the Los Angeles district who were currently active members of the Communist Party and who were under deportation proceedings (R. 61, 104, 141,

172). On October 6, 1950, the District Director submitted to the Acting Commissioner a report containing summaries of facts taken from the confidential records of the Government at Los Angeles in the cases of eleven aliens, among whom were included the petitioners, who were currently active in, and of eight aliens who were past members of, the Communist Party (R. 41, 90, 131, 161). On October 21, 1950, the Acting Commissioner directed by radiogram that Hyun, Carlson and Carlisle be rearrested and detained pending determination of their deportability pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra* (R. 42, 131, 161–162). The radiogram also directed that the other active Communist aliens under proceedings be arrested and detained,[1] on which authority petitioner Stevenson was rearrested (R. 91).

On October 31, 1950, new warrants of deportation were issued based on the ground that petitioners, after entry, were members of the Communist Party of the United States (R. 12, 81, 127, 168).[2] Hearings were promptly instituted

[1] In the order to detain active Communist aliens, other than the three specifically named, the Acting Commissioner permitted the district director to take into consideration hardship to the aliens because of health or special family situation in determining whether to detain them.

[2] Section 22 of the Internal Security Act of 1950 had added to the classes of deportable aliens "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * * (iv) the Communist or other to-

under these warrants and efforts made by the Government to expedite them. Except in the case of Hyun, delays in the hearings were caused by action of petitioners' counsel (R. 303–315). These hearings have been completed and orders of deportation have been entered against each of petitioners, with the exception of Carlisle, against whom an order of deportation has been prepared, but has not yet been signed and entered.[3] Appeals are now pending in each case before the Board of Immigration Appeals.[4]

Petitioners sought release on bail by means of petitions for writs of habeas corpus filed in the District Court for the Southern District of California on November 2 and 3, 1950, which attacked the validity of the Attorney General's action in detaining them. It was alleged in each case that the petitioner had lived within the jurisdiction of the United States for an extended period of time; that he had engaged in a lawful occupation and had always behaved in a law-abiding manner; that he had strong family ties in this country; and when previously free on bond he had reported for hearings as required and had at all times made

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talitarian party of any State of the United States * * *" (8 U. S. C., Supp. IV, 137).

[3] The dates of these orders of deportation are as follows: Carlson (March 29, 1951); Hyun (August 1, 1951); Stevenson (August 1, 1951).

[4] In the case of Carlson, the appeal has already been heard by the Board of Immigration Appeals, but no decision has yet been announced.

himself available (R. 1, 68, 114, 151). The petition, in each case, contended that the Attorney General's action in confining the petitioner without bail was an abuse of the discretionary power of the Attorney General (R. 5, 73, 122, 156), a denial of due process in violation of the Fifth Amendment to the Constitution (R. 7, 75, 122, 157), and a denial of bail in violation of the Eighth Amendment (R. 7, 75, 157).

The Director's return to the order to show cause stated the reason for the denial of bail in each case to be "that there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States" (R. 11, 79, 125).

The district court held that the action of the Attorney General in denying bail was reviewable (R. 20), but that the burden was upon the petitioners to show that the Attorney General had been unreasonable and had abused his discretionary power. Since the petitioners offered no evidence to this effect, the district court held there had been no abuse of discretion and dismissed the proceedings (R. 23, 24). 94 F. Supp. 18.

On appeal, the court of appeals reversed and remanded on the ground that the Director's return was insufficient in that it had not mentioned any facts upon which a determination could be

made that the Attorney General had acted on reasonable grounds (R. 35, 28–37). 186 F. 2d 183.

At the second hearing, the Director filed new returns in which he alleged that each of the petitioners had, after entry, been a member of the Communist Party of the United States (R. 43, 93, 133, 164). To these returns the Director appended affidavits verifying petitioners' active leadership in the Communist Party program (R. 45, 95, 136, 166). The facts so presented may be summarized as follows:

(*a*) Carlson was editor of the "Young Worker," official organ of the Young Communist League of the United States; he was a member of the National Executive Committee of the Young Communist League; he was Secretary and President of the Young Communist League of California; during the latter part of 1946 until about the summer of 1947, he was State Secretary of the Communist Party of the United States for the State of Wisconsin; and in September 1949 he headed the Marxist Institute in Los Angeles (R. 51–52).

(*b*) Stevenson was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936; she was secretary of a Communist Party Unit in 1938; and she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 95).

(*c*) Hyun was instrumental in reactivating the Communist Party in Hawaii in 1945; he was a member of the Executive Board of the Communist Party in Hawaii in 1946; he led and participated in discussion groups on indoctrination of Communist philosophy, planning; strategy, and recruitment of members in the Communist Party during the years 1946 and 1947; he was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and he was educational director of the West Lake Section of the Communist Party in Los Angeles, California, in 1949 (R. 136).

(*d*) Carlisle was a speaker at closed meetings of Communist Party functionaries in 1933; in 1935 he was editor of the "Western Worker" (the then official Western organ of the Communist Party, U. S. A. Section of the Communist International); in 1949 he was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 166).

The district court held that this was a sufficient showing under the decision of the court of appeals, and on the failure of petitioners to offer any

evidence to the contrary, the court dismissed the proceedings (R. 64–65, 106, 143, 174–175). The court of appeals affirmed, stating that in the light of the findings of Congress expressed in the Internal Security Act of 1950 and the incontrovertible "world-wide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence," the return and affidavits were sufficient to show that the Attorney General had not abused his discretionary power in refusing to enlarge the petitioners on bail pending the determination of their deportability (R. 339, 331–350). 187 F. 2d 991.

SUMMARY OF ARGUMENT

I

Congress intended that the Attorney General should give weight to the nature and extent of an alien's Communist activity in determining whether to detain him during the pendency of deportation proceedings. We respectfully refer this Court to our brief in *Butterfield* v. *Zydok*, No. 136, this Term, for a review of the legislative history supporting this point. Petitioners' argument to the contrary ignores the entire history of the Internal Security Act of 1950.

The decision to detain these specific aliens was the result of an application by the Commissioner of Immigration of the congressional intent to the particular facts of the individual cases. There

was no abuse of discretion, since the facts as to each petitioner form an appropriate basis for a determination that detention was in each case necessary.

II

The constitutional argument made in our brief in *Butterfield* v. *Zydok* is equally applicable to this case. Our argument here, as there, is that neither the Eighth nor the Fifth Amendment prevented Congress from delegating to the Attorney General authority to detain aliens pending deportation proceedings in such cases as these. The petitioners' argument that detention is in violation of the Eighth Amendment ignores both the provisions of the Amendment and the fact that these are not criminal proceedings. Their argument that either the statute or the action of the Attorney General deprived petitioners of liberty without due process in violation of the Fifth Amendment finds no support in the facts of these cases.

ARGUMENT

I. THE DETENTION OF THE PETITIONERS WITHOUT BOND WAS, IN THE CIRCUMSTANCES OF THESE CASES, WITHIN THE DISCRETION GRANTED THE ATTORNEY GENERAL

A. *Congress gave the Attorney General broad discretionary power to detain aliens pending deportation, intending that the factor of Communist activity be given great weight*

We respectfully refer the Court to pages 11 to 25 of our brief recently filed in *Butterfield* v.

Zydok, No. 136, this Term, where it is demonstrated that Congress intended the Attorney General to take into consideration the nature and extent of an alien's Communist activities in determining whether the national welfare requires that he be detained during the pendency of deportation proceedings.

The only real attack which the petitioners make on this proposition is at pages 18 to 21 of their brief. Here they appear to argue that since deportation proceedings have some of the attributes of criminal trials, the criminal cases holding that the future availability of the defendant is the only factor to be considered in fixing bail are applicable to deportation proceedings. This argument is faulty in several respects: First, the criminal cases involve not general principles, but the construction of statutes or rules which by their terms apply to criminal cases only. (E. g. 46 (c) F. R. Crim. P.) Second, although it is true that a deportation proceeding in some respects has attributes similar to a criminal trial, it is equally true that in others the proceedings are very different. Thus, it is well established that deportation procedings may be carried on before officers of the executive branch of the Government, rather than in the courts, and that an alien is not entitled to trial by jury. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Zakonaite* v. *Wolf*, 226 U. S. 272; *Bilokumsky* v. *Tod*, 263 U. S. 149. Third, and even more sig-

nificantly, petitioners choose to ignore the wealth of legislative history which shows that Congress intended the Attorney General to take into consideration security factors in determining whether to grant bail pending the determination of an alien's deportability. Specifically, we refer the Court to pages 20 to 25 of our brief in *Butterfield* v. *Zydok*.

Even under prior law, the Court of Appeals for the Second Circuit interpreted the bail provision in the Immigration Act as requiring the Attorney General to consider, among other factors, national security (*United States ex rel. Potash* v. *District Director*, 169 F. 2d 747, 751, see p. 16 of our brief in *Butterfield* v. *Zydok*). Congress had this interpretation before it when it amended the Immigration Act of 1917 by the Internal Security Act of 1950 to give the Attorney General the express authority to retain an alien in custody. Statements by members of the Judiciary Committee which reported out the amendment make it clear that Congress wanted to clarify the law to conform to the decision in the *Potash* case. The sponsors of the legislation explained to Congress the necessity of detaining aliens pending deportation (96 Cong. Rec. 10449–10450, 10453). And finally, to clinch the matter Congress wrote into section 2 of the bill as paragraph 13, the following statement (50 U. S. C., Supp. IV, Sec. 781 (13)):

> (13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

We submit that the Attorney General has not misinterpreted the intention of Congress.

B. *The orders that the petitioners be detained in custody were well within the discretionary authority granted by Congress*

The record demonstrates that the determination to detain these specific aliens without bail was a reasonable exercise of discretion in the light of the circumstances surrounding the cases.

In order to determine which of the aliens against whom deportation proceedings were pending at the time of the passage of the Internal Security Act of 1950 constituted a danger to national security because of their Communist activities, the Acting Commissioner of Immigration and Naturalization, on September 26, 1950, directed the District Directors to supply him with a report on each of those aliens within his district (R. 41). On October 6, 1950, the District Director in Los Angeles forwarded to the Acting Commissioner a list of 19 names of active and past members of the Communist Party and a report on each of the persons named, setting forth facts taken from the records of the Los Angeles office. Each of the petitioners was named and his activities described

in this report. (R. 41, 90–91, 131, 161–162.) At the time of these reports, hearings had been begun in the case of each petitioner, but (except in the case of Carlisle) had been discontinued because of the decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Two weeks later, on October 21, 1950, the Acting Commissioner specifically directed the rearrest of Hyun, Carlisle, and Carlson, with instructions that they be detained pending the determination of their deportability. The District Director was also instructed to arrest all the other active Communist aliens, but to detain them only if they could be held without hardship to their health or families. It was under this direction that Stevenson was arrested and detained. The factors on which the Acting Commissioner relied were expressed by him in the radiogram sent to the District Director on October 27, 1950. This radiogram read as follows (R. 42, 91, 132, 162):

> For your information and that of United States Attorneys and aliens and their Attorneys the instruction to you of October Twenty First to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued deten-

tion might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by Section Nine Zero Point One of Title Eight CFR Paren Twelve FR Five Zero Seven Two July Thirty One Nineteen Forty Seven Paren under Section Thirty Seven of the Alien Registration Act of Nineteen Forty Comma Eight USC Four Five Eight.

The District Director, in his returns to the writs of habeas corpus, revealed the specific circumstances with respect to each of the petitioners which led to the decision to detain them (R. 52, 95, 136, 166). These circumstances are outlined *supra*, at pages 7, 8. It is noteworthy that in traversing these returns none of these petitioners took issue with any of the factual statements contained therein (R. 49, 98, 138, 169).

It thus appears that as of the time the petitions for habeas corpus were filed, the detention of the petitioners was supported by a reasonable ground to believe that each of them was, or recently had been, engaged as a leader in certain specific Communist activities. As of the present time, there is an even stronger ground for detaining three of them, since orders of deportation have actually been issued against Carlson, Hyun, and Stevenson (see p. 5, *supra*). Therefore, if the peti-

tioners' analogy to criminal proceedings were followed, the case would now be analogous to a defendant seeking bail after conviction rather than before trial.[5]

There can be no doubt that in each of these cases, therefore, the Attorney General had ample reason to connect each alien individually with specific Communist activity. Although there was no evidence in the particular cases as to the danger to national security from the Communist program, it is submitted that it would be unreasonable and unnecessary to have to reestablish in each individual case the facts with respect to the aims and objectives of the Communist Party in this country. Rather, it was entirely proper to take into account the information which had been presented as evidence in the *Dennis* case as to the activities of the Communist Party, which evidence was found by the Court of Appeals for the Second Circuit to be sufficient to sustain a conviction under the Smith Act (54 Stat. 671, Secs. 2, 3, 18 U. S. C. 10, 11).[6] Moreover, the Attorney

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[5] It is settled that there is no absolute right to bail after conviction. Rule 46 of the F. R. Crim. P. permits bail after conviction only where there is a substantial question in favor of defendant, and even in such cases bail remains within the discretion of the court. *Williamson* v. *United States*, 184 F. 2d 280 (C. A. 2).

[6] *Dennis* v. *United States*, 183 F. 2d 201 (C. A. 2). This Court restricted certiorari to exclude consideration of this issue. *Dennis* v. *United States*, 340 U. S. 863. However, the Court's determination in that case (*Dennis* v. *United States*,

General would have been derelict in his duty had he neglected entirely the congressional findings as to the danger to the nation from Communist activities.

In these cases, the action of the Attorney General must be sharply distinguished from the situation, as viewed by this Court, in *Stack* v. *Boyle*, decided by this Court on November 5, 1951:

> * * * The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.

Petitioners' argument might lead to the assumption that a similar blanket approach was used in this case. However, the above analysis of the sequence of events shows that such an assumption is false, and that, consistently with the standards enunciated in the *Stack* case, the Attorney Gen-

341 U. S. 494) that the conviction did not involve an infringement of the First Amendment serves to answer petitioners' offhand attempt to invoke the First Amendment as a basis for claiming illegality of detention in this case. (See Pet. 29–31.)

eral carried out his function by applying the policy fixed by Congress to the facts in the case of each petitioner.

II. THERE IS NO CONSTITUTIONAL IMPEDIMENT TO DETENTION OF PETITIONERS PENDING THEIR DEPORTATION

The arguments on constitutionality are set forth in our brief in *Butterfield* v. *Zydok,* at pp. 28–41, and little need be added in order to meet the contentions made by the petitioners.

Their argument with respect to the application of the Eighth Amendment is somewhat difficult to follow. It appears to be that if Congress intended to delegate to the Attorney General authority to refuse bail on the ground that an alien's activity constituted a security risk, such a standard violates the Eighth Amendment. This argument is not supported by the language of the Eighth Amendment, which simply forbids the exaction of "excessive bail." Moreover, as we point out in our brief in *Butterfield* v. *Zydok,* pp. 30–31, the Eighth Amendment has been held to apply only to criminal proceedings.

With respect to deportation proceedings, it has always been held that aliens have no absolute right to bail (*Wong Wing* v. *United States,* 163 U. S. 228), and the early statutes gave them no such right. It would seem clear then that when Congress decided to grant bail as a matter of grace, it was well within its power to make the

grant dependent upon the discretion of the Attorney General. The legislative history shows that Congress intended the national safety to be a prime element in the exercise of that discretion. Certainly that is not an unreasonable standard.

Petitioners also appear to make the argument that Congress denied aliens due process of law under the Fifth Amendment by making it mandatory on the Attorney General to deny bail to alien communists (Pet. Br. p. 13). We need not consider the constitutionality of such a law for that is not what the present law provides, and that is not the way the Attorney General has construed it. Representative Walter, Chairman of the Judiciary Committee of the House, in commenting on the provision as it appeared in the Hobbs bill before its incorporation into the final act, specifically stated (96 Cong. Rec. 10449-10450):

> * * * No particular hardship is going to be worked on anyone because, bear this fact in mind, *it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power.* If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.* [Emphasis supplied.]

And the act itself, by its terms, leaves no doubt that the power to detain is discretionary, not mandatory.

If, on the other hand, this argument is intended to mean that Congress had no power to guide the Attorney General in the exercise of his discretion by selecting a certain class of aliens for special consideration, that argument runs directly contrary to the history of all the legislation with respect to bail, both in this country and in England. From the time of our first legislation on the subject, Congress has always set aside the class of defendants charged with crimes that subject them to capital punishment for the special exercise of discretion on bail. The same has been true in England. (See our brief in *Butterfield* v. *Zydok*, pp. 33–36.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the judgment of the court below should be upheld.

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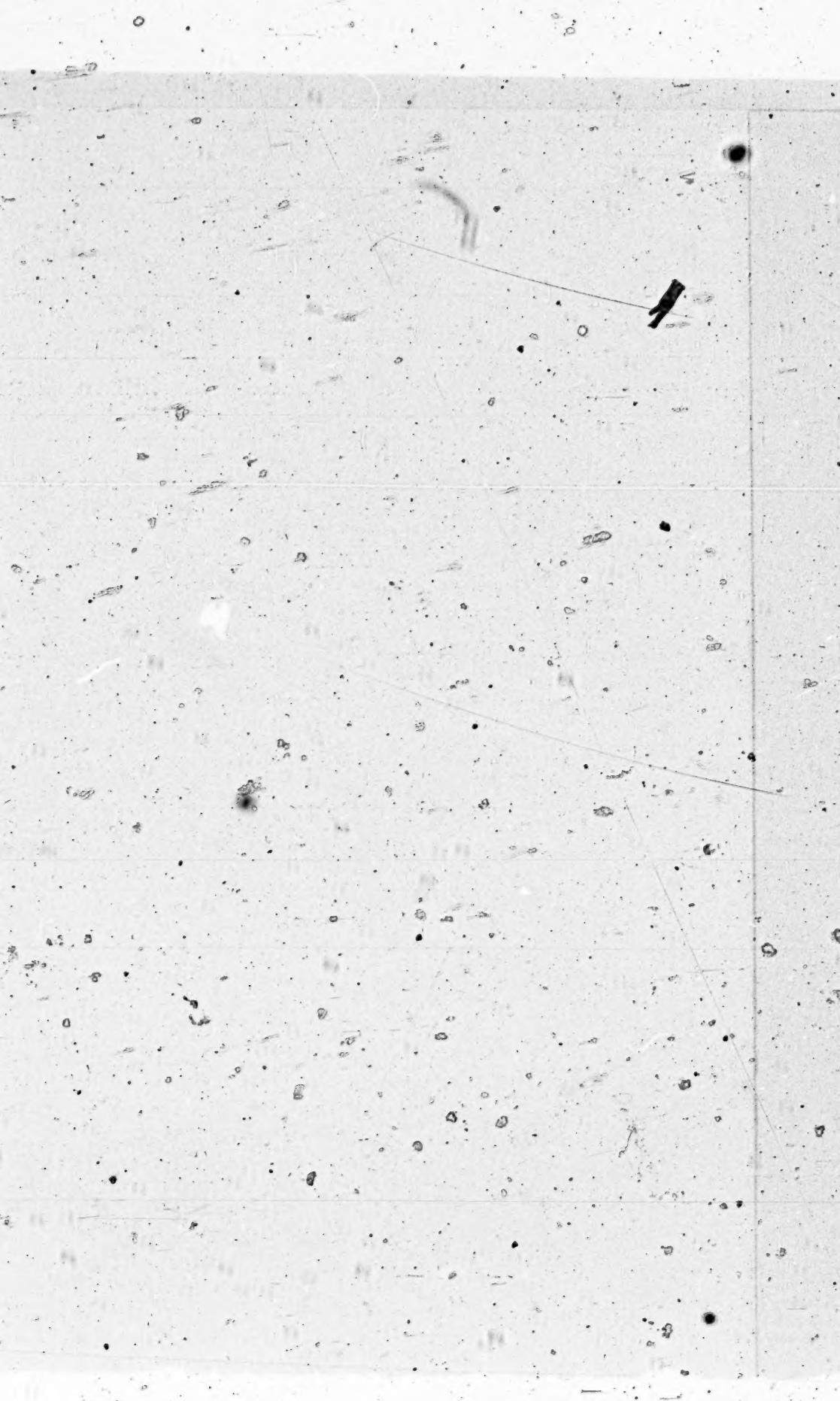

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

All of the petitioners are aliens who, prior to the passage of the Internal Security Act of 1950, had been arrested on warrants of deportation and enlarged on bail pending the determination of their deportability. In each case, the basis for the warrant, pursuant to the Immigration Act of 1918, was that the alien, after entry, was found to be a member of an organization which believes in,

advises, advocates and teaches the overthrow by force or violence of the Government of the United States (R. 45, 94-95, 135, 165).

The Internal Security Act of 1950 specifically made membership in the Communist Party after entry ground for deportation [1] and provided that:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General * * * [2]

After passage of the Act, the Attorney General ordered the petitioners to be re-arrested and detained without bail pending the determination of their deportability (R. 42). New warrants of deportation were issued based on the ground that the aliens after entry were members of the Communist Party of the United States (R. 12, 81, 127, 168).

The petitioners sought release on bail by means of a petition for a writ of habeas corpus which attacked the validity of the Attorney General's action. The petition in each case alleged that the petitioner had lived within the jurisdiction of the United States for an extended period of time; that he had engaged in a lawful occupation and had

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[1] 8 U.S.C. 137-3.
[2] 8 U.S.C. 156(a).

always behaved in a law-abiding manner; that he had strong family ties in this country; and when previously free on bond he had reported for hearings as required and had at all times made himself available (R. 1, 68, 114, 151). The petition, in each case, contended that the Attorney General's action in confining the petitioner without bail was an abuse of the discretionary power of the Attorney General (R. 5, 73, 122, 156), a denial of due process in violation of the Fifth Amendment to the Constitution (R. 7, 75, 122, 157), and a denial of bail in violation of the Eighth Amendment (R. 7, 75, 122, 157).

The Director's return to the order to show cause stated the reason for the denial of bail in each case to be "that there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States" (R. 11, 79, 125).

The District Court held that the action of the Attorney General in denying bail was reviewable (R. 20), but that the burden was upon the petitioners to show that the Attorney General had been unreasonable and had abused his discretionary power. Since the petitioners offered no evidence to this effect, the District Court held there had been no abuse of discretion and dismissed the proceedings (R. 23, 24). 94 F. Supp. 18 (S.D. Cal.).

On appeal, the Court of Appeals reversed and

remanded on the ground that the Director's return was insufficient in that it had not mentioned any facts upon which a determination could be made that the Attorney General had acted on reasonable grounds (R. 35, 28-37). 186 F. 2d 183 (C.A. 9).

At the second hearing, the Director filed a new return in which he alleged that each of the petitioners had, after entry, been a member of the Communist Party of the United States (R. 43, 93, 133, 164). To this return the Director appended affidavits verifying the petitioners' active leadership in the Communist Party program (R. 45, 95, 136, 166).[3] The District Court held that this was

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[3] (a) With respect to petitioner Carlson the respondent's affidavit stated among other things that petitioner was editor of the "Young Worker," official organ of the Young Communist League of the United States; that he was a member of the National Executive Committee of the Young Communist League; that he was Secretary and President of the Young Communist League of California; that during the latter part of 1946 until about the summer of 1947, the petitioner was State Secretary of the Communist Party of the United States for the State of Wisconsin; and that in September, 1949 he headed the Marxist Institute in Los Angeles (R. 52).

(b) With respect to petitioner Stevenson the respondent's affidavit stated among other things that petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936, that she was secretary of a Communist Party Unit in 1938; and that she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 95).

(c) With respect to petitioner Hyun, the respondent's affidavit stated among other things that petitioner was instrumental in reactivating the Communist Party in Hawaii in 1945, that he was a member of the Executive Board of the Communist Party in Hawaii in 1946; that he led and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the Communist Party during the years 1946 and 1947;

a sufficient showing under the decision of the Court of Appeals, and on the failure of the petitioners to offer any evidence to the contrary, the court dismissed the proceedings (R. 64-65, 106, 143, 174-175). The Court of Appeals affirmed, stating that in the light of the findings of Congress expressed in the Internal Security Act of 1950 and the incontrovertible "world-wide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence," the return and affidavits were sufficient to show that the Attorney General had not abused his discretionary power in refusing to enlarge the petitioners on bail pending the determination of their deportability (R. 339, 331-350). 187 F. 2d 991 (C.A. 9).

The Government does not oppose the granting of a writ of certiorari in this case since, as pointed out in our petitions for certiorari in *Butterfield*

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that he was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and that he was educational director of the West Lake Section of the Communist Party in Los Angeles, California in 1949 (R. 136).

(d) With respect to petitioner Carlisle, the respondent's affidavit stated, among other things, that petitioner was a speaker at closed meetings of Communist Party functionaries in 1933; that in 1935 he was editor of the "Western Worker" (the then official Western organ of the Communist Party, U.S.A., Section of the Communist International); that in 1949 he was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 166).

v. *Zydok*, No. 136, this Term, and *Gordon* v. *Heikkinen*, No. 334 this Term, there is a conflict between the decision of the court below in this case and the decisions of the Courts of Appeals for the Sixth and Eighth Circuits as to the principles applicable to the exercise of discretion by the Attorney General under the Internal Security Act and to judicial review thereof. The *Zydok* decision by the Sixth Circuit (187 F. 2d 802) and the *Heikkenen* decision by the Eighth Circuit (190 F. 2d 16), hold that, in exercising his discretion to grant or withhold bail, the Attorney General is limited to the purpose of assuring the alien's availability, and cannot deny bail on the basis of the alien's Communist activities. The decision in the instant case in effect holds that, in exercising his discretion, the Attorney General may give paramount consideration to national security and may deny bail on the basis of active participation in the Communist party.

It is therefore respectfully submitted that this Court should grant this petition, together with the petitions in No. 136 and in *Gordon* v. *Heikkinen*, in order to resolve the conflict as to the factors which the Attorney General may consider in exercising his discretion to grant or withhold bail.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1951

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In the Supreme Court of the United States

OCTOBER TERM, 1951

FRANK CARLSON; MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZIDOK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT IN NO. 35 AND FOR THE PETITIONER IN NO. 136

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT IN NO. 35 AND FOR THE PETITIONER IN NO. 136

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1. During the argument of the above cases Mr. Justice Black requested a reference to the statutory

authority under which the Attorney General had delegated his authority under 8 U.S.C. 156(a) to determine whether aliens in deportation proceedings should be admitted to bail. The Chief Justice directed that a memorandum be submitted covering this point.

Section 20(a) of the Immigration Act of 1917, as amended, (64 Stat. 1010; 8 U.S.C., Supp. IV, 156(a)), vests in the Attorney General the discretion to decide whether aliens subject to deportation proceedings shall be continued in custody, released under bond, or released on conditional parole. This designation of the Attorney General as the repository of authority is consistent with the pattern generally followed throughout the immigration laws. In prescribing duties and responsibilities under the immigration laws, the statutes generally provide that such duties and responsibilities shall be performed by the Attorney General. Indeed, the diverse provisions of Sections 19 and 20 of the Immigration Act of 1917, as amended, 8 U.S.C. (1946 ed. and Supp. IV) 155 and 156, relating to the deportation process invariably specify that authority shall be exercised by the Attorney General.

It is manifest that Congress did not contemplate that the Attorney General would himself discharge each of his statutory duties in thousands of deportation cases. The Attorney General must act, of course, through subordinate officers. Section 37(a)

of the Alien Registration Act of 1940, 54 Stat. 670, 675, 8 U.S.C. 458(a), specifically authorized such delegation by providing:

> The powers conferred upon the Attorney General by this Act and all other powers of the Attorney General relating to the administration of the Immigration and Naturalization Service may be exercised by the Attorney General through such officers of the Department of Justice, including officers of the Immigration and Naturalization Service, attorneys, special attorneys, and special assistants to the Attorney General, as he may designate specifically for such purposes.

Regulations implementing this statute and delegating to the Commissioner of Immigration and Naturalization the Attorney General's powers under the immigration laws were issued as 8 C.F.R., 1943 Supp., 90.1 as follows:

> Under the general direction of the Attorney General, the Commissioner of Immigration and Naturalization (hereinafter called the Commissioner) shall supervise and direct the administration of the Immigration and Naturalization Service and, subject to the limitations of other provisions of this part, shall have authority to exercise all powers of the Attorney General relating to the administration of that Service and the administration of the immigration, nationality, and all other laws administered by that Service and shall designate such officers of the Service as he may

> select, with the approval of the Attorney General, to exercise any power or authority of the Attorney General in the administration of any designated specific provision of such laws. * * *[1]

In addition, the President's Reorganization Plan No. 2 of 1950, 15 F. R. 3173, 5 U.S.C., Supp. IV, following section 133z-15, which became effective May 24, 1950, directs in section 1 that:

> (a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Attorney General all functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department.

Section 2 of this Plan empowers the Attorney General to direct "the performance by any other officer, or by any agency or employee, of the Department of Justice of any function of the Attorney General * * *".

On May 24 and June 6, 1950, the Attorney General, acting pursuant to the authority in Reorganization Plan No. 2, issued Supplements No. 42 and No. 44 of Department of Justice Order No. 3732, which confirmed previous delegations of authority to officers of the Department of Justice. Paragraph 4 of this amended Order directs that:

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[1] Although the codification of section 90.1 in 8 C.F.R. was discontinued November 16, 1948, 13 F.R. 6760, that regulation has not been revoked. Moreover, its terms are confirmed and restated in Notice No. 1, 11 F.R. 177A-110-114, Section 1.42, and in Notice 90, Section 90.1, 12 F.R. 4781, 13 F.R. 6760.

> Except as hereinbefore provided, all functions, duties, powers, and authority heretofore vested in any officer, agency, or employee of the Department of Justice, by delegation or otherwise, are delegated to, and shall continue to be vested in, such officer, agency, or employee.

Thus, the Attorney General's powers under the immigration laws, previously delegated to the Commissioner of Immigration and Naturalization, were revested in the Attorney General under Reorganization Plan No. 2 and were re-delegated to the Commissioner of Immigration and Naturalization under Supplements No. 42 and 44 to Department of Justice Order No. 3732.

2. At the conclusion of the argument, Mr. Justice Frankfurter requested a list of pending deportation cases involving subversive charges, showing the bail or detention status prior to the Internal Security Act of 1950 and such status after the enactment of that Act. Such a list has been prepared by the Immigration and Naturalization Service and is appended.[2]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER, 1951.

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[2] The delay in the filing of the memorandum is due to the fact that the material contained in the list had to be collected from the various districts of the Immigration Service.

Pending Deportation Cases Involving Subvers

(1) Current deportation proceedings involving charges under the A

September 23

Immigration district	Subject
Philadelphia	Dora Coleman
	Abraham Davis
	Frank Hellman
	Carl Herman
	Helen Herman
	Luigi Mascitti
	Josel Sandler
	Orlando Valeri
	Teresa Horvath
	Zdena Peach
	Stefano Petrola
	Mike Puchacz
	Joseph Ptasienski, Jr.
	Andrew Spehar
	George Radatovich
	Vincent Kemenovich
Miami	Sven Antonious Steffner
Kansas City	Philippe E. L. Roelants
	Bertha P. Roelants
	Spiridon Constantine
	Antonia Sentner
Seattle	Olov Edwin Okerstrom
	John L. Stenson
	Hamish Mackay
	Carolina Halverson
	Casimiro Absolar
	Hazel Wolfe

sive Charges—Bail or Detention Status

et of October 16, 1918, as amended, which were pending on
, 1950

Bail or detention status—9/23/50	Change in such status after 9/23/50
$4,000	No change
$1,000	No change
2,000	No change
500	No change
Parole	No change
2,000	No change
500	No change
1,000	No change
Parole	No change
1,000	No change
2,000	No change
2,000	No change
1,000	No change
1,000	No change
500 (court bond)	No change
5,000	Detained 10/22/50; released 11/3/50 $10,000 court bond
500	No change
1,000	No change
1,000	No change
1,000	No change
2,000	Detained 10/22/50; released 11/15/50 on $2,000 court bond
500	No change
1,000	No change
1,000	No change
1,000	No change
1,000	No change
500	No change

	Jurij Luckman	500	No change
	Heinrich Pahls	On own recognizance	No change
	Gene Cabigas	Warrant of Arrest unserved as of 9/23/50	Corditional parole since service of warrant
	George Dumlao	1,000	Bond canceled 4/2/51; on own recognizance
	Ernesto Mangaoang	5,000	Detained 10/22/50; released 1/4/51 under $5,000 court bond
	Boris Sassieff	500	Detained 10/22/50 without bond; released 12/1/50 under $500 court bond
	Cecil Jay	1,000	Detained 10/24/50; released $1,000 court bond.
	Jose Prudencio	1,000	No change
	Mogomet Gergieff	1,000	No change
	James Cryan	On recognizance	No change
	Ponce Torres	1,000	No change
	Christ Mensalvas	4,000	Detained 10/24/50; released 10/27/50 under $5,000 bond pursuant to court order
	Charles R. Kohler	1,000	No change
	Julius Blichfeldt	Own recognizance	No change
San Francisco	Jose A. Ferreiro	Conditional parole	No change
	Krishna Chandra	2,000	No change
	James George Manouskos	1,000	No change
	Nota Klopper	1,000	Bond increased to $5,000
	Ernest Otto Fuchs	5,000	Detained 10/21/50; released 10/26/50 $5,000 bond; July 1951 in custody US Marshal—violation Smith Act, transferred to LA and in custody there
	Nat Yanish	5,000	Detained 10/22/50; released 11/26/50 $5,000 court bond

Immigration district	Subject	Bail or detention status—9/23/50	after 9/23/50 Change in such status
	William Heikkila	5,000	Detained 10/22/50; released 11/26/50 $5,000 court bond
San Antonio	John Greenberg	Paroled	No change
	John Butt Crewe	2,000	No change
	Ada Violet Crewe	2,000	No change
	Manuel Pizarro Alcayaga	1,000	No change
	Jose Estrada Castillo	1,000	10/23/50 held without bail; 10/28/50 released $1,000 bail by court order
El Paso	Joseph George Strecker	Conditional parole	No change
Los Angeles	Modesto Bagay	1,000	No change
	Joseph Boross	2,000	No change
	Harry Carlisle	5,000	Detained 10/21/50; $5,000 court bond 5/8/51
	Francisco Espinoza Corona	4,000	No change
	Jaroslav Dmytryk	2,000	No change
	Zusman Fierstien	500	No change
	Robert Norberg Galvan	1,000	No change
	Zdena Hernandez	1,000	No change
	David Hyun	2,000	Detained 10/21/50; court bond $5,000 5/8/51
	Alfred Isakowitsch	500 and parole	No change
	Josef Lubej	4,000	No change
	Alice Orans	1,000	No change
	Esther Sazer	5,000	No change
	Jacob Schneider	Parole	No change
	Solomon Skolnick (Frank Carlson)	1,000	Detained 10/21/50; Court bond $5,000 5/8/51
	Hsue Shen Tsien	15,000	No change
	Miriam Stevenson	2,000	Detained 10/24/50; released court bond $5,000 5/8/51
Boston	Jose Garcia	$500	No change

	Iscz Aldifcho or Aldischo	2,000	No change
	Ivan Nabsczka	1,000	No change
	Freda Betta Swerdlow	2,000	No change
	Demetry Timoshuk	1,000	No change
	George Azorian	1,000	No change
	Eulalia Figueirido	Parole	No change
	Hans Mikhelsen	2,000	No change
	Guicomo Quatrone	1,000	No change
	Karl Latva	2,000	No change
Buffalo	Steve Avramovich	1,000	No change
	Thomas Wilfred Cromie	Conditional parole	No change
	Heinrich Emile Dumeier	Conditional parole	No change
	Pal Feldman	500	No change
	Morris Jaffa	1,000	No change
	Joseph Lukas	1,000	Detained 10/24/50; released 11/13/50 on $1,000 court bond.
	Stefan Markiwicz	Conditional parole	No change
	Franz Frederick Daniel August Meyer	Conditional parole	No change
	Leon Nicoloff	1,000	No change
	Feodos Nikulchenok	Conditional parole	No change
	Victor Romond	1,000	No change
	David Schlossberg	4,000	Detained 10/24/50; released 11/13/50 on $4,000 court bond.
	Viasire Statevich	Confined mental institution.	No change
	Carl Ragnar Frederick Videll	Conditional parole	No change
Detroit	Bertha Barker	2,000	No change
	James Barker	2,000	No change
	Agnes Ann Edgar	Paroled	No change
	Allen Edgar	Paroled	No change
	Rushidi Emin	1,500	No change
	Jacob Fahlman	1,000	No change

Immigration district	Subject	Bail or detention status—9/23/50	Change in such status after 9/23/50
	Anna Ganley	5,000	Detained 8/7/51; released 8/8/51 on $5,000 court bond.
	William Gava	500	No change
	Mary Grosman	1,000	No change
	Katherine Margaret Hyndman	1,000	No change
	Joseph Knerlev	1,000	No change
	Anton Koshewoy	Paroled	No change
	Marko Kosta	500	Detained 8/3/51; released 8/8/51 on $500 court bond.
	Marion Koziel	Paroled	No change
	Maria Kristalsky	2,000	No change
	William Kruchay	1,000	No change
	James Elwood Mackay	2,000	Detained 10/23/50; released 11/7/50 on $2,000 court bond.
	Louis Kuzmanov	Paroled	No change
	John Mastrandrea	1,000	Detained 8/3/51; released 8/9/51; $1,000 court bond.
	Waino John Mykannen	1,000	No change
	Angelo Pagotto	500	No change
	Antonio Papadimitriou	Paroled	No change
	James Papandreau	2,000	Detained 10/24/50; released 11/6/50 on $2,000 court bond.
	Alex Pechen	Paroled	No change
	Nick Poleschuk	1,000	No change
	John Pope	1,000	No change
	Mike Pope	1,000	No change
	Blaga Popravska	Paroled	Detained 8/3/51; released 8/7/51 on $500 court bond.
	Louis Ragni	Paroled	No change
	John Rogach	1,000	No change

	Fritz Karl Rust	2,000	Detained 8/8/51; released 8/8/51 on $2,000 court bond.
	Stephan Singler	500	No change
	Fred Wagner	Paroled	No change
	John Zydok	2,000	Detained 10/23/50; released on $2,000 court bond.
Baltimore	Perfecto Conrojoy Tanno	1,000	No change
Chicago	Vincent Andtulis	500	Detained 10/22/50; released 11/7/50 $1,000 court bond.
	Moses Resnikoff	5,000	Detained 10/22/50; released 11/10/50 $5,000 court bond.
	Joseph Stiegerwald	1,000	No change
	Frank Buerklin	1,000	No change
	Philip Israel Hauser	1,000	No change
	Peter Kushnir	1,000	Detained 10/25/50; released 11/10/50 $1,000 court bond.
	Fred Lishota	Own recognizance	Detained 10/26/50; released 11/10/50 $1,000 court bond.
	Josip Ruic	500	No change
	Joseph Weber		
	Antoniette Siuba	1,000	No change
	Henrich Stanislaw Nawroicki	1,000	No change
	Peter Falkowski	500	No change
	Charles Rowaldt	Conditional parole	No change
	Otto Skog	500	No change
	Peter John Warhol	1,000	Detained 10/22/50; released 11/2/50 $2,500 court bond.
	Carl Robert Newstrom	Conditional parole	No change
	Knute Elner Heikkinen	5,000	Detained 10/23/50; released 1/15/51 on $2,500 court bond.

Immigration district	Subject	Bail or detention status—9/23/50	Change in such status after 9/23/50
	John Hilty	1,000	Detained 11/2/50; released 11/17/50 on $1,000 court bond.
	Nick Stess	1,000	Detained 11/2/50; released 11/17/50 on $1,000 court bond.
	Sergius Prus	1,000	No change
	Carl Sklar	1,000	Detained 10/22/50; released 11/10/50 on $1,000 court bond.
New York	Alexander Bittelman	500	10/23/50 detained; 11/17/50, $5,000 court bond
	Frank Borich	5,000	10/22/50 detained; reapprehended and again released 12/6/50, $5,000 court bond
	Willie Ernest Bush	2,000	10/23/50 detained; 11/17/50, $2,000 court bond
	August Cohn	1,000	None
	Dean Benedetto	500	None
	Robert E. Dickhoff	Recognizance	3/15/51 paroled
	Sarah Disend	2,000	8/24/51, $2,000 bond
	Andrew Dmytryshyn	5,000	10/23/50 detained; 11/17/50, $5,000 court bond
	Charles Doyle	3,500	Oct./50 detained; released 12/29/50 $5,000 court bond.
	Harry Egger	Recognizance	8/1/51, conditional parole
	Frank Fleer	2,000	None
	Major Giebs	1,000	None
	James Gill	2,000	None
	Ida Gottesman	1,000	None
	Nicolaos Kaloudis	Recognizance	10/25/50 detained; 12/14/50, $1,000 court bond
	Gabrielle Kleim	500	None

Meyer Klig	Recognizance	10/26/50 detained; released
Charles Kratochvil		11/17/50, $5,000 court bond
Earnest Langnickel	Recognizance	3/19/51, conditional parole
Rose Lightcap	Recognizance	None
	5,000	10/24/50 detained; released
Alexander Meltzer		11/17/50 $5,000 court bond
Samson Milgrom	1,000	None
	5,000	8/2/51 detained; 8/6/51, $5,000 bond
Michael Obermeier		None
Carl Einar Paivio, Sam Fields, or Charles Nelson	1,000	11/1/50 detained; released
	5,000	11/17/50, $5,000 court bond
Sam Paul or Paulos		None
Irving Potash	2,000	None
Benny Saltzman	3,500	None
Jack Schneider	500	10/25/50 detained; 11/17/50, $1,000 court bond
	Recognizance	11/1/50 detained; 11/17/50, $5,000 court bond
Claudia Scholnick	5,000	None shown
Carl Skoglund	Released on bond, amount not shown	None shown
Jacob Abraham Stachel	3,500	6/11/51, supervised parole
Dimitri Startzeff	Recognizance	None
Anna Taffler nee Devine	500	None
Sol Taffler	500	Parole
Morris Taft or Tapuach	Recognizance	10/26/50 detained; 11/17/50, $4,000 court bond
Manuel Tarazona	4,000	8/1/51, conditional parole
Frank Vandam	Recognizance	6/5/51, $1,000 bond
Wilhelm Weber	Recognizance	None
John Williamson	3,500	10/23/50 detained; 11/17/50, $5,000 court bond
Harry Yaris	5,000	

Immigration district	Subject	Bail or detention status—9/23/50	Change in such status after 9/23/50
	Rifke Yaschewsky or Gannett	5,000	11/1/50, detained; 11/17/50, $5,000 court bond
	George Saliagopoulas or Kuluras or Harry Kelly	Paroled	9/6/51 detained

(2) List of pending deportation cases where warrant of arrest involving charges under the Act of October 16, 1918, as amended, issued after September 23, 1950, and present detention or bond status of each

Immigration District	Subject	Bail or detention status
Philadelphia	Erich Haak	$2,000
	Michail Philippou	4,000
	Adam John Biling	4,000
	Heinz Langerhans	
	Sol Hertz	5,000
	Aron Mungiu	2,000
	Norman Wm. Rodgers	In custody since service of warrant of arrest 8/22/51
	Augusto Ricompensato	Conditional parole
	Michael Zagorodny (Gordon)	In custody U. S. Penitentiary, Lewisburg, Pa. serving criminal sentence
	Annie Lee James	2,000
	Czeslaw Henry Wyczolkowski	500
	Charles Spivack	Conditional parole since 12/27/50
Miami	Rafael Mario Nicasio Rangel & Rodriquez	1,000
	Onelia Catalina Triana Y Pages de Rangel	Conditionally paroled
	Isaac Elias Saporta	2,000
	Helge Nicaoli Langfeldt	Detained since 11/6/51 in default $4,000 bond
	Edunia Ramirez de Carrion Mirabel	Warrant issued 11/14/51 provides for release $2,000 bond; not apprehended
	Benjamin Saul	Conditional parole

Seattle	Michael Feuersinger	Conditional parole
	Pedro Cabornay	1,000
	Constancio Cargado	1,000
	Doreen Masterson	Conditional parole
	Ramon Tancioco	1,000
	Joseph Otto Schmitt	1,000
	Donald Roy Van Sickle	Conditional parole
	Jean Jules Fogerouses	1,000
	Alfred Goetz	Serving sentence in U. S. penitentiary, McNeil Island, Washington
San Francisco	Giovanne Vidolin	5,000
	Ida Miller nee Rosnick	2,500
	Jacob Miller	2,500
	Francesco Fiori	Conditional parole
	John Charles Dubeta	Conditional parole
	Guido Marchelo Trento	Conditional parole
	Ludmilla S. Mihailova	Detained without bond
Los Angeles	Karekin Andekian	2,000
	Nedjelko Bakovich	Conditional parole
	Francesco Guiseppé Bonetti	2,000
	Juan Lopez Chavez	1,000
	Frank Leslie Craig	2,000
	Justo Cruz-Solorio	Detained without bond
	Fanny Dell	2,000
	Yetta Dickens	2,000
	Agustin Exparza-Flirian Floriana	Detained without bond
	Elias Vasquez Espinoza	1,000
	Oscar Charles Fewkes	Conditional parole
	Blanche Fradkin	2,000
	David Fradkin	2,000
	Caroline Galalian	1,000
	Bessie Geiser	Detained without bail
	Andres Gonzales-Hernandez	Detained without bail
	Joso Graovac	2,000

Immigration District	Subject	Bail or detention status
	Aaron Grosberg	4,000
	Verna Lessin	2,000
	Pedro Lopez-Munoz	Detained without bail
	Anastacio Mendez de la Rosa	Conditional parole
	Haruntun Minookian Minasian	2,000
	Abraham Roast	4,000
	Morris Rubin	2,000
	Rachel Rubin	4,000
	William Rudick	Conditional parole
	Halldora Kristin Sigurdson	2,000
	Rose Spector	5,000
	Yasuo Takemoto	Detained without bail
	David Tartakoff	Conditional parole
	Daniel Vega	2,000
	Arsin Yerganian	Detained without bail
Honolulu	Simein Ligsay Bagasol	Detained 1/8/51; released 1/15/51 on $1,000 bond, following court action.
	Pedro Afren Racela	Conditional parole
Buffalo	Thomas Vincent	2,000
	Alfred Favorito	
	William Kalman	5,000
	George Vasiloff	2,000
Detroit	Paul Baltich	1,000
	Pearl Demery	Conditional parole
	Albert Joseph des Rosiers	1,000
	Joe Dumas Dujmovich	4,000
	Mary Guy	500
	Olimpiu Hanes	2,000; bond canceled and released $2,000 court bond
	George Jasinski	1,000
	Wasyl Kardasz	2,000
	Nicholas Kozar	1,000

	Anna Kruchen	1,000
	Julius Kudela	1,000
	Kay Ohanesian	1,000
	Jacob A. Rusak	2,000
	Theresa Szerdi	2,000
	Theodore Thompson	1,000
	Afansy Zaytsef	2,000
	Otto Gustav Zimmermann	Conditional parole
Baltimore	Constantine Ionescu	1,000
New York	William Abrams	2,000
	@ Wolfe Abrams	5,000
	or William Mayersos	
	Francesco Ammirati	
	Paul Cinat	1,000
	Harry Goldstin	2,000
	Benitez Gonzalez	2,000
	Anna Hafner	2,000
	Paul Juditz	2,000
	Julian Krasowski	Detained; released 3/9/51 $5,000 court bond
	Morris Lerner	5,000
	Michael Nukk	2,000
	Jean Schultz Rosenthal	5,000
	Erwin Otto Schroth	Paroled
	Norman Tallentire	2,000
	Annie Powers	3,500
	Martin Young @ Leon Platt	Detained
	Alec Cyril Burleigh	Detained
	Dimitri Vera Kamper @ Dick Kamper	2,000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 35.

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, and HARRY CARLISLE, *Petitioners*,

v.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service.

No. 136.

JAMES W. BUTTERFIELD, Director of Immigration and Naturalization Service, *Petitioner*,

v.

JOHN ZYDOK.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 85.

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN and HARRY CARLISLE, *Petitioners*,

v.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service.

No. 136.

JAMES W. BUTTERFIELD, Director of Immigration and Naturalization Service, *Petitioner*,

v.

JOHN ZYDOK.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits.

PETITION FOR REHEARING.

We will not here retrace the views expressed in the dissenting opinions, although these in themselves warrant rehearing. Reconsideration is also required, however, because of certain fundamental misconceptions in the Court's decision which are not dealt with by the dissents.

I. The Court's Misconception of Section 2 of the Internal Security Act.

The petitioners in these cases were charged in the deportation proceedings with being within a deportable class of aliens—persons who have been members of the Communist Party. The Court holds that aliens within this deportable class may be imprisoned without bail in the Attorney General's discretion as being security risks. It holds that the Attorney General may without more determine such aliens to be dangerous and therefore non-bailable because of Congress' findings in section 2 of the Internal Security Act.

Section 2 of the Internal Security Act deals with the "Communist movement" and "Communist organizations," the latter term being defined in section 3(3), (4), (5) of the Act. In order to match the findings in section 2 with the charge against the petitioners, the Court had to find that Congress was referring to the Communist Party of the United States in section 2. Otherwise, of course, there would be no relevance in considering section 2 with respect to the petitioners.

The Court supposes that by equating the Communist Party of the United States with a "Communist organization" under section 2 of the Act, it and the Attorney General are carrying out the purpose of Congress. The fact is, however, that this supposition and the Court's holding so far from carrying out the Congressional purpose thwart it. The Court has shown a fundamental misunderstanding of the Internal Security Act and its scheme.

The Internal Security Act is anti-Communist (and anti-democratic) legislation which establishes various controls and prohibitions which effectively outlaw organizations within its scope. Congress, however, felt that both public opinion and constitutional considerations were opposed to outlawing or restricting particular organizations by legislative fiat. It therefore made legislative findings in section 2 not about the Communist Party of the United States by name but about unparticularized "Communist organi-

zations." It then set up an administrative agency, the Subversive Activities Control Board, whose function is to determine, after hearing and on the basis of prescribed standards, just what organizations in the United States are "Communist organizations" within the meaning of section 2. See secs. 3(3), (4), (5); 12 and 13 of the Internal Security Act. It made the determinations of the Board subject to comprehensive judicial review, and provided that Board decision should not be final until such review had been exhausted. Sec. 14 of the Act.

Congress was aware that a politically-appointed Board, applying standards rigged by Congress, would determine that the Communist Party of the United States was a "Communist organization" referred to in section 2 of the Act, no matter what the nature of the evidence produced in the administrative hearing. At the same time, however, Congress was anxious to interpose the appearance of administrative determination after hearing in order to preserve a facade of due process. This fact appears not only from the scheme of the Act as a whole but also from its legislative history. Thus Representative Nixon, one of the authors of the bill which finally evolved into the Internal Security Act, and chairman of the legislative subcommittee of the House Committee on Un-American Activities, explained the bill as follows to the Senate Judiciary Committee:

> "We felt also that the Mundt bill, in its original form, was not the proper approach to the problem for two reasons. In the first place, the bill specifically named the Communist Party of the United States and attempted to build its definitions around the name of the Party. From having heard the witnesses before our committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and consequently the committee attempted to find a legislative device for meeting the problem in a constitutional manner." (Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 5852, p. 40.)

The sponsoring House Committee explained the structure of the bill as follows:

> "To make membership in a specifically designated existing organization illegal per se would run the risk of being held unconstitutional on the ground that such an action was legislative fiat.
>
> "This legislation does not constitute a fiat. The Communist organization of the United States is not made guilty of any offense by reason of the enactment of the provisions of this act. If, however, the Communist organization of the United States or any other organization now in existence or to be formed operates in such a way that it comes within the definitions and performs activities which are proscribed under the act then the legislation will apply to it. If such organization changes its characteristics, then the objectives sought by the committee will have been accomplished." (H. R. Report No. 2980, 81st Cong., 2d Sess., accompanying H. R. 9490.)

At the present time, there has been no determination by the Subversive Activities Control Board that the Communist Party of the United States is a Communist organization within the meaning of the Internal Security Act. Currently the Board is conducting a hearing to determine if the Communist Party is such an organization. It has been taking testimony in this hearing since April 1951, and the Attorney General, who is the petitioner in the administrative proceeding has not yet completed his case. Decision by the Board is still far off, and, of course, judicial review of the Board's decision is even further off.

Congress' genteel substitute for a crude, outright legislative identification of the Communist Party with any Communist organization referred to in section 2 is, therefore, not yet operative. The administrative-hearing, judicial-review phases of the mechanism must still be finished.

The Court now completely wrecks the entire scheme and purpose of Congress. Congress was sufficiently sensitive to constitutional considerations and to public opinion to

fabricate a cloak of due process which might avoid the appearance of legislative attaint. The Court ruthlessly removes the cloak by holding that section 2 is a legislative reference to the Communist party of the United States *eo nomine*. It is possible that Congress' attempt to circumvent the bill of attainder prohibition may turn out to have been unsuccessful, but it is unquestionable that it intended to make the attempt and that the Court is frustrating Congress' purpose by ignoring the attempt and its features of administrative determination.

What is particularly perplexing is that Mr. Justice Clark should be a member of the majority which now disregards Congress' scheme by holding that section 2 makes legislative findings as to the Communist Party of the United States without reference to the administrative mechanism. In the passage we have quoted above from testimony of Representative Nixon, it is stated that the Committee decided to avoid specifically naming the Communist Party "from having heard witnesses before our committee" who pointed out that this would be "an unconstitutional approach." One of the witnesses to whom Mr. Nixon was referring was then Attorney General Clark, who testified as follows before the legislative subcommittee of the Committee on Un-American Activities:

> "A statute which would define the nature and purpose of an organization or group by legislative fiat is likely to run afoul of the due process requirements. The Congress cannot by statute presume a state of facts that is arbitrary or that attempts to prevent proof of true facts. This we call legislative fiat.
>
> * * * *
>
> "The fact that legislation may be subject to objection as being discriminatory cannot be overlooked. By singling out a political party or group for prohibitive legislation you may be charged with discriminatory action which would be objectionable as special legislation.
>
> "In this connection also, the protection against the passage by the Congress of any Bill of Attainder (Art.

1, 9, 3) is a most important consideration." (Hearings before Legislative Subcommittee, House Committee on Un-American Activities, Feb. 5, 1948.)

It is disconcerting to find that Mr. Justice Clark now overlooks the scheme which Congress set up in an effort to follow the advice he gave it as Attorney General.

The fact is that under the structure of the Act the only deportation provision which is to be matched with the findings of section 2 is not the provision expelling Communist Party members, but instead the provision expelling members of organizations required to register under section 7 of the Act (see sec. 22 of the Internal Security Act, adding subsection 2(E) to the October 16, 1918 Act). For, under the Act's scheme, the organizations referred to in section 2 are not supposed to be legislatively identified groups, but instead organizations who have been identified after an administrative process.

The Court has, therefore, blundered in supporting the Attorney General's refusal of bail to alleged members of the Communist Party on the basis that he has applied the legislative definition in section 2 of what are dangerous aliens. In addition, the only way in which dangerousness as a factor in bail discretion was imported into these cases was also through this misuse of section 2. Accordingly, section 2 cannot be used either to define petitioners' class as dangerous or to supply for that class a basis for importing the concept of dangerousness as a bail factor. This leaves as the only standards available to the Attorney General in applying bail discretion those normal standards which are outlined in *Stack* v. *Boyle*, 342 U. S. 1. These relate to assuring the presence of the accused and are obviously more than satisfied in the cases of petitioners.

This result also avoids the constitutional vice committed by the decision in authorizing preventive detention for reasons of domestic "security." The Court assumes that detention to prevent domestic misconduct is ancillary to the expulsion power. This assumption is, however, unfounded.

The only detention power which is ancillary to expulsion is the power to detain to insure availability of the alien. Detention for any other purpose obviously does not serve the expulsion purpose, and cannot be justified by it. If aliens can be preventively imprisoned, then so can citizens, because the source of power is not the jurisdiction over aliens but some other jurisdiction. Yet Mr. Justice Jackson has refused to permit detention for anticipated danger even after conviction. *Williamson* v. *United States*, 95 L. ed. 1379.

II. The Court's Misconception of the Government's List of Bail Cases.

The Court supports its conclusion that the Attorney General exercised discretion in cases of aliens charged with being Communists by stating that his report to the Court "shows allowance of bail in the large majority" of political deportation cases. This statement shows a misconception of the situation.

The fact is that the Immigration and Naturalization Service did decide to imprison without bail, and without exercising individualized discretion, all aliens charged with being or having been Communists, subject only to possible exceptions for aliens in ill health and aliens willing to "cooperate" with the Service by becoming informers. To carry out this decision, it did not, however, at one time rearrest all aliens under political charges. Instead, it first rearrested fifty such aliens, with the intention of following up this first onslaught with arrests of all other such aliens. It failed to follow up as planned not because it made a late switch to exercising discretion, but only because the courts made its plans futile by releasing all but five of the fifty who were so rearrested. See testimony of Chief of the Detention, Deportation and Parole Section, Immigration and Naturalization Service, quoted in Brief for Respondent in No. 136, p. 8. The number of enlarged aliens on the government's list does not, therefore, as the Court sup-

poses, demonstrate any exercise of discretion by the Immigration and Naturalization Service. It only reflects the fact that the courts would not tolerate the Service's refusal to exercise discretion.

III. The Court's Misconception in Passing on the Validity of the Deportation Statute.

The issue in these cases was whether the Attorney General could imprison the petitioners without bail pending the deportation proceedings. In supporting its decision on this issue, the Court went far afield to hold expressly that Congress could validly provide for the deportation of alien members of the Communist Party.

To us it seems clearly inappropriate for the Court in a bail proceeding to have considered the validity of the deportation statute under which the aliens are charged. We cannot believe that in a proceeding for bail for one indicted for larceny, the Court would have considered the constitutionality of the larceny statute. Since the validity of the substantive statute was not properly involved in these cases, a rehearing should be granted because the decision is in part predicated on an irrelevant consideration.

The inappropriateness of the Court's considering the validity of the deportation statute in a proceeding so removed from involving that issue is emphasized by the circumstance that the subject was decided without benefit of briefs and argument addressed to it. Yet it is undeniable that the question of validity poses serious constitutional problems which do not warrant the summary disposition made of them by the Court's opinion.

This deportation provision is the first in our history which makes cause for deportation membership in a specifically named organization without more. Obviously there looms large the issue of whether this unprecedented legislation constitutes a bill of attainder and a violation of due process and First Amendment rights.

The Court supports the validity of the deportation provision by referring to the power to deport anarchists. But the analogy is inappropriate, since Congress has not provided that members of a particular society should be deported on a legislative finding that the named society advocates anarchism as understood by Congress.

The Congress seems to hold that the Communist Party of the United States is an organization which advocates the forcible overthrow of the government, although the deportation statute independently proscribes membership in organizations of the latter description. It is well known that the Communist Party strongly disputes the charge that it advocates violence. For the Court to decide this factual question which was not litigated results in a judicial bill of attainder. Furthermore, the Court's conclusion is inconsistent with the one previous decision of the Court on this subject. *Schneiderman* v. *United States*, 320 U. S. 118.

IV. The Court's Misconception of the Scope of Its Decision.

The Court has held that Communists and former Communists may be held without bail because they are dangerous people. To us, as to Mr. Justice Black, it seems repugnant to the Constitution and to the principles of a free society that persons who have committed no crime may be imprisoned without bail because they are or were Communists. Particularly is this so when the persons are considered dangerous not because of anything they may do, but only because of what they may say—in the Court's words, "participating in the Party's indoctrination of others to the prejudice of the public interest."

But however we may deplore the fact, we recognize that a majority of the Court has consciously and deliberately ruled that alien Communists and former Communists are outlaws. We can not believe, however, that the Court would also consciously and deliberately decide that aliens who are not Communists are also outlaws. Yet such is the inescapable result of the Court's decision.

The Court's decision permits the Attorney General to imprison without bail aliens who never were members of or affiliated with any Communist organization merely on the basis of an incorrect accusation that they were members or affiliates. In the present cases, the returns to the writs of habeas corpus merely alleged that evidence in the files of the Immigration and Naturalization Service indicated that the petitioners had been Communists. Under contemporary conditions, it is perfectly apparent, however, that government investigative files are full of untrue "evidence" that innumerable persons were members of or "affiliated" with the Communist Party. Yet all the Immigration Service need do to justify imprisoning innocent aliens is to allege in returns to writs of habeas corpus that its files contain "evidence."

Two illustrations of the unreliability of the Service's "security" files come to mind. Ellen Knauff was accused on the basis of confidential files of the Immigration and Naturalization Service of being a security menace of the first order. See *Knauff* v. *Shaughnessy*, 338 U. S. 537. Yet the accusations were found to be completely baseless when, after great travail and with the assistance of members of Congress, she was able to obtain a hearing. In another episode, the distinguished foreign editor of the Nation, Julio Alvarez del Vayo, was recently imprisoned on Ellis Island on his return from covering a session of the U. N. General Assembly.

It is true that an alien has an opportunity to traverse the allegations of the Service's return to a writ. But this opportunity is of small value. If the alien files a traverse, he merely obtains a hearing on habeas corpus which inquires into the very fact which is charged in the deportation warrant. In this hearing, the alien has the burden of proof, and "the Attorney General's exercise of discretion" in refusing bail is, in the words of the Court, "presumptively correct and unassailable except for abuse." Furthermore, this burden the alien must carry before he has

been able to prepare for a hearing on the principal fact, and when, being imprisoned, he is least able to prepare and present his case. In this hearing, he must disclose his defense to an accusation before the accusing witnesses are placed on the stand, and he is effectively deprived of the privilege against self-incrimination. Finally, courts are under psychological pressures of great magnitude not to appear to reject claims of the Attorney General that the national security is at stake. To use again the analogy of a person indicted for larceny, it is as if the accused were imprisoned without bail until he proved his innocence. Such a procedure obviously makes a mockery of the right to bail, discretionary or otherwise.

The net result is that on the flimsiest, unsubstantiated evidence, the Attorney General may imprison without bail recklessly accused aliens who never were members of or affiliated with any radical organization. The Court's decision, therefore, is not merely anti-Communist; it is anti-alien.

Finally, the decision directly jeopardizes the liberty of citizens, as well as aliens. For it is a precedent not only as to bail in expulsion cases, but also as to the writ of habeas corpus generally. The Court has here held, in a decision which cannot logically be confined to alien expulsion cases, that the writ may be defeated merely on a showing of suspicious circumstances. It has thus vitiated one of the chief historic functions of the writ, the prevention of the tyranny of imprisonment merely on the basis of suspicions entertained by the government. *Ex Parte Watkins*, 3 Peters 193, 202.

CONCLUSION.

America owes an incalculable debt for the nourishment it has derived from the alien, radical and conservative. One of its greatest glories, eloquently expressed on the Statute of Liberty, is its tradition of welcome and political freedom for the oppressed and poor of foreign lands. This debt

and this tradition have been repudiated by the Court's decision. And because liberty is indivisible, the Court's decision has made our society less free for citizens and aliens alike.

The petition for rehearing should be granted.

Respectfully submitted,

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I certify that the within and foregoing petition for rehearing is presented in good faith and not for delay.

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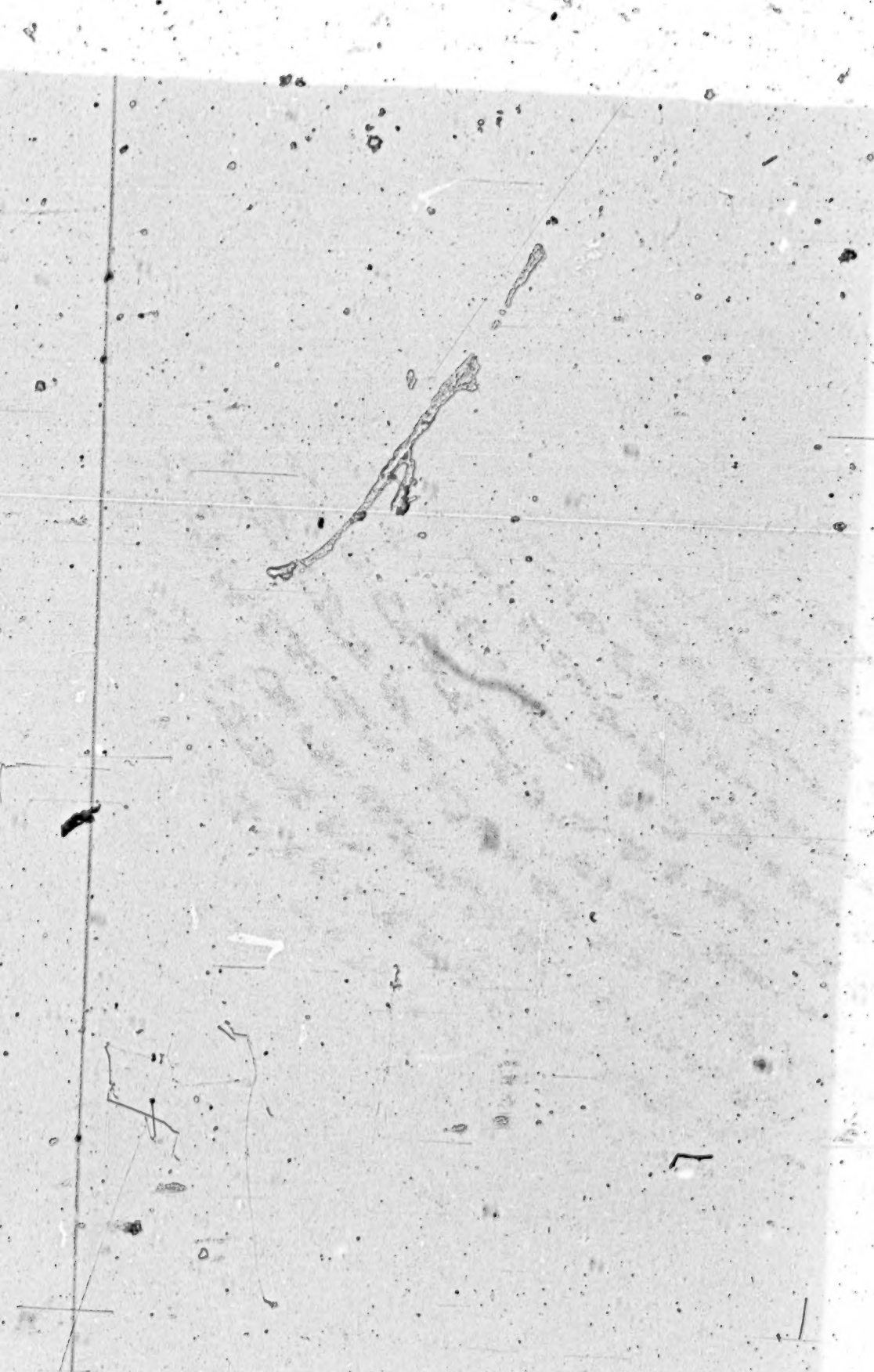

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No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the order of the United States District Court for the Eastern District of Michigan denying respondent's petition for a writ of habeas corpus and remanding the cause to the District Court with directions that respondent be granted bail in a reasonable amount in the deportation proceeding pending against him.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 113-116) is reported at 187 F. 2d 802. The findings of fact and conclusions of law of the District Court appear at pages 12-19 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered March 26, 1951 (R. 113). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in exercising his discretion to grant or withhold bail pending final determination of the deportability of an alien, the Attorney General is justified in denying bail on the ground that the alien is an active participant in Communist Party affairs, or whether he is bound also to consider other circumstances, particularly the likelihood that the alien will report as ordered.

STATUTE INVOLVED

Section 20(a) of the Immigration Act of February 5, 1917 (39 Stat. 874, 890, 54 Stat. 1238, 57 Stat. 553; 8 U.S.C. 156) as amended by Section 23 of the Internal Security Act of 1950 (Pub. L. 831, c. 1024, 81st Cong., 2d sess.), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attor-

ney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. * * *

STATEMENT

In August 1949, respondent was taken into custody under a deportation warrant of arrest, issued on June 30, 1949 (R. 6-7), charging that he had been, after entry, a member of an organization advocating the violent overthrow of the government, and thus deportable under Section 1 of the Act of October 16, 1918, as amended (8 U.S.C. 137).[1] He was released on $2,000 bail shortly thereafter. (R. 13, 15, 6-7, 27.) In October 1949, a deportation hearing was conducted under the warrant, but, as the result of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, it became necessary to grant him a

[1] Section 1 of the 1918 Act has since been further amended by Section 22 of the Internal Security Act of 1950. The effect of Section 22, insofar as pertinent to this case, is discussed *infra*, pp. 8-9.

new hearing. The second hearing began September 19, 1950, but was adjourned at respondent's request. (R. 12, 5, 93, 95, 97, 102-103).

On October 21, 1950, shortly after the effective date of the Internal Security Act, the Assistant Commissioner of Immigration and Naturalization, sent petitioner a radiogram instructing him to apprehend respondent and detain him pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*. The arrest was effected two days later under the outstanding warrant. In a radiogram dated October 25, 1950, the Acting Commissioner confirmed the Assistant Commissioner's instructions, specifically stating that respondent was to be held without bail. (R. 15, 22-24.)

Respondent filed a petition for a writ of habeas corpus in the United States District for the Eastern District of Michigan, challenging the validity of his detention (R. 1-2). At a hearing on the writ, the following facts were adduced:

On May 25, 1949, in the course of the investigation leading to the issuance of the deportation warrant of arrest, respondent had testified under oath that he was a member of the Communist Party (R. 105, 87, 51) and was Financial Secretary of the Hamtramck, Michigan, unit of the Party in January 1949 (R. 63-64). He had then testified that, at the last previous meeting of the group, they had discussed the New York Commu-

nist case, methods of raising funds for the defense thereof, and "the Chinese situation" (R. 56) and that, pursuant to instructions received from Communist Party headquarters in New York, he had collected and delivered over $100 for the defense of that case (R. 56-58, 65, 77, 80). He had refused to state the number of persons who usually attended meetings of his unit of the Party or the names of the persons from whom he made the collections, because such information was a Party secret and he did not want to be a "stool pigeon" (R. 58, 76). In addition, respondent entered into a stipulation as to his past Communist record, both at the 1949 and the 1950 deportation hearings. From the stipulation at the 1950 hearing, it appears that he was a member of the Party from 1919 to about 1938, that he was readmitted to the Party in 1947, and that he still occupied the office of Executive Secretary of the Hamtramck unit.[2] (R. 97, 102-104.) The Commissioner of Immigration and Naturalization was furnished with a copy of the record of the May 1949 hearing (R. 92).

Before the evidence as to his Communist background, as related in the preceding paragraph, was introduced, respondent had taken the stand

[2] The record is not entirely clear as to whether he was still Executive Secretary in 1950. Finding of Fact 12 (R. 16) is subject to the conclusion that he served in that capacity only during 1949. Our statement that he still occupied the position in 1950 is based on the testimony at R. 97.

in support of his petition. He testified that he was employed in a cafe, later identified as the Detroit Workmen's Cooperative Restaurant; that he owned a five-room house in Detroit, where he resided with his wife; that he had two sons, a daughter, and five grandchildren, all of whom were born in this country; that both sons served in the armed forces of the United States during World War II; that he had sold about $50,000 in war bonds and donated blood seven times during that war; that he had reported regularly under the terms of his previous bail; and that he did not believe that he had violated any law since the enactment of the Internal Security Act. In addition, he testified that he would remain in this country and comply with any requirement to report as directed, if he were enlarged under bond. (R. 29-32.)

On cross-examination respondent admitted that he had an alias (R. 47-49), stated that he could not recall whether he had sold bonds before the Nazi invasion of Russia or after the beginning of the Korean War (R. 34-35, 61), and declined, on self-incrimination grounds, to answer several questions as to whether he had been affiliated with the Communist Party (R. 39-47, 49, 82). After he had stated that he did not think he had collected funds for the defense of the New York Communist case (R. 50-51), he was questioned as to his testimoney at the investigation in May 1949 (see p. 4,

supra). After part of the record of that testimony had been read to him, he was again asked if he had collected funds for the New York case, and he categorically denied that he had done so (R. 62). But when his attention was specifically called to his inconsistent testimony at the investigation, he reverted to his claim that he could not remember having made a collection for that purpose (R. 64, 66). Similarly, as other questions and answers from the record of the May 1949 hearing were read to him, he repeatedly stated that he could not remember them (R. 63-68, 53-58, 76-80), thus causing the court to remark (R. 72) that his demeanor had changed after the completion of his direct examination, that he had become "extremely evasive," and that "he is a symphony of 'I don't remember, I don't remember, I don't remember.'" Similarly, while respondent denied that the restaurant in which he was employed was controlled by the Communist Party, and while he disclaimed knowing whether the members of the "committee" which he said operated the establishment were Communists, he exhibited considerable reluctance to give their names, and he was forced to admit that there was a deportation warrant outstanding against one of them (R. 36, 38-39).

In denying the petition (R. 19), the District Court found, *inter alia*, that respondent's evasive demeanor on cross-examination demonstrated that

he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 16-17); that an alien who has been free on bail pending final determination of his deportability may be rearrested and continued in custody without the issuance of a new deportation warrant of arrest (Conclusion of Law 2, R. 17); and that there had been no abuse of administrative discretion in continuing respondent in custody after his rearrest (Finding of Fact 17, R. 17).

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment, with directions to grant bail in some reasonable amount (R. 113, 115, 116). It held that, in determining the question of whether to deny bail, the Attorney General could not rest on membership in the Communist Party alone, but was under a duty to consider all the attending circumstances, in particular, the likelihood that the alien will appear when ordered to do so (R. 114-115). The opinion states (R. 115):

> The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

REASONS FOR GRANTING THE WRIT

In view of the fact that the Internal Security Act considerably expands the grounds for deportation, particularly in respect of aliens with Com-

munist backgrounds, the Attorney General has been and will be called upon, more and more, to exercise his authority to grant or deny bail pending deportation proceedings. Since the enactment of the Internal Security Act, approximately fifty alien Communists have instituted proceedings to obtain enlargement on bail pending final determination of their deportability. There has been considerable disagreement in the district court decisions in such cases[3] and the Court of Appeals for the Ninth Circuit has reached conclusions inconsistent with the decision of the court below as to the standards applicable to the exercise of discretion by the Attorney General and to judicial review thereof. *Carlson* v. *Landon*, 187 F. 2d 991 (C.A. 9), petition for certiorari pending, No. 35 of this Term. It is essential, therefore, that this Court resolve the conflict in the lower court decisions for the guidance of the Attorney General and the lower courts.

---

[3] *United States ex rel. Klig* v. *Shaughnessy*, 94 F. Supp. 157 (S.D.N.Y.); *Warhol* v. *Shrode et al.*, 94 F. Supp. 229 (D. Minn.); *United States ex rel. Mavrokefalus et al.* v. *Murff*, 94 F. Supp. 643 (D. Md.); *Mangaoang* v. *Boyd*, W. D. Wash., holding that the denial of bail to an alien was an abuse of discretion, despite specific evidence that the alien was a member of the Communist Party some years previously and respondent's testimony that he had evidence, from a confidential source, that the alien was still an active Communist; *In the Matter of Izydor Schultwolf*, W. D. Texas, where a petition for a writ of habeas corpus was dismissed on the basis of an allegation in the return that the respondent had determined, from confidential information, that petitioner was a threat to national security.

In the instant case, the Court of Appeals for the Sixth Circuit holds that, in exercising his discretion to grant or withhold bail, the Attorney General cannot limit his consideration to the alien's Communist activities but must weigh all the attending circumstances, in particular those bearing on the likelihood that the alien will appear when ordered to do so.

In *Carlson* v. *Landon*, 187 F. 2d 991, on the other hand, the Court of Appeals for the Ninth Circuit, on facts not essentially different from those involved in the instant case, held that the District Court had properly "weighed the evidence in the light of the times and, we think, came to the correct and legal conclusions," i.e., that bail had been properly denied, 187 F. 2d at 1003. There, as here, the aliens had lived within the jurisdiction of the United States for extended periods of time; there was no evidence that they had been convicted of any crime or had committed sabotage; they had strong family ties in this country; they had previously been free on bond on deportation charges under the 1918 Act; they had reported for hearings as required; and previous deportation hearings against them had been invalidated under the *Sung* decision.[4] Like respondent, they contended, and

[4] The facts in regard to each of the aliens, as summarized by the Ninth Circuit, may be found in 187 F. 2d, as follows: *Carlson*, pp. 995-996; *Mrs. Stevenson*, pp. 997-999; *Hyun*, pp. 999-1000; *Carlisle*, pp. 1000-1002. In particular the facts in Mrs. Stevenson's case show that she was recently less active in Communist activities than this respondent.

indeed correctly, that the only evidence advanced to support their detention without bail was that they had been active in the Communist movement. In holding that bail was properly denied, the Ninth Circuit, unlike the court below, stressed the importance of "the legislative findings set out in the Internal Security Act of 1950," as to the dangers to national security from the Communist Party, 187 F. 2d at 997. Thus the Ninth Circuit considers that, in exercising his discretion, the Attorney General may give paramount consideration to national security and deny bail solely on the basis of active participation in the Communist Party; the Sixth Circuit holds that he must give paramount consideration to the probability that the alien will appear as ordered and may not deny bail on the basis of Communist activities alone. Only this Court can resolve that conflict.

CONCLUSION

It is respectfully submitted that this Court should grant this petition in order to resolve the conflict between the decisions of the Sixth and Ninth Circuits as to the standards governing the exercise of discretion by the Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1951.

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No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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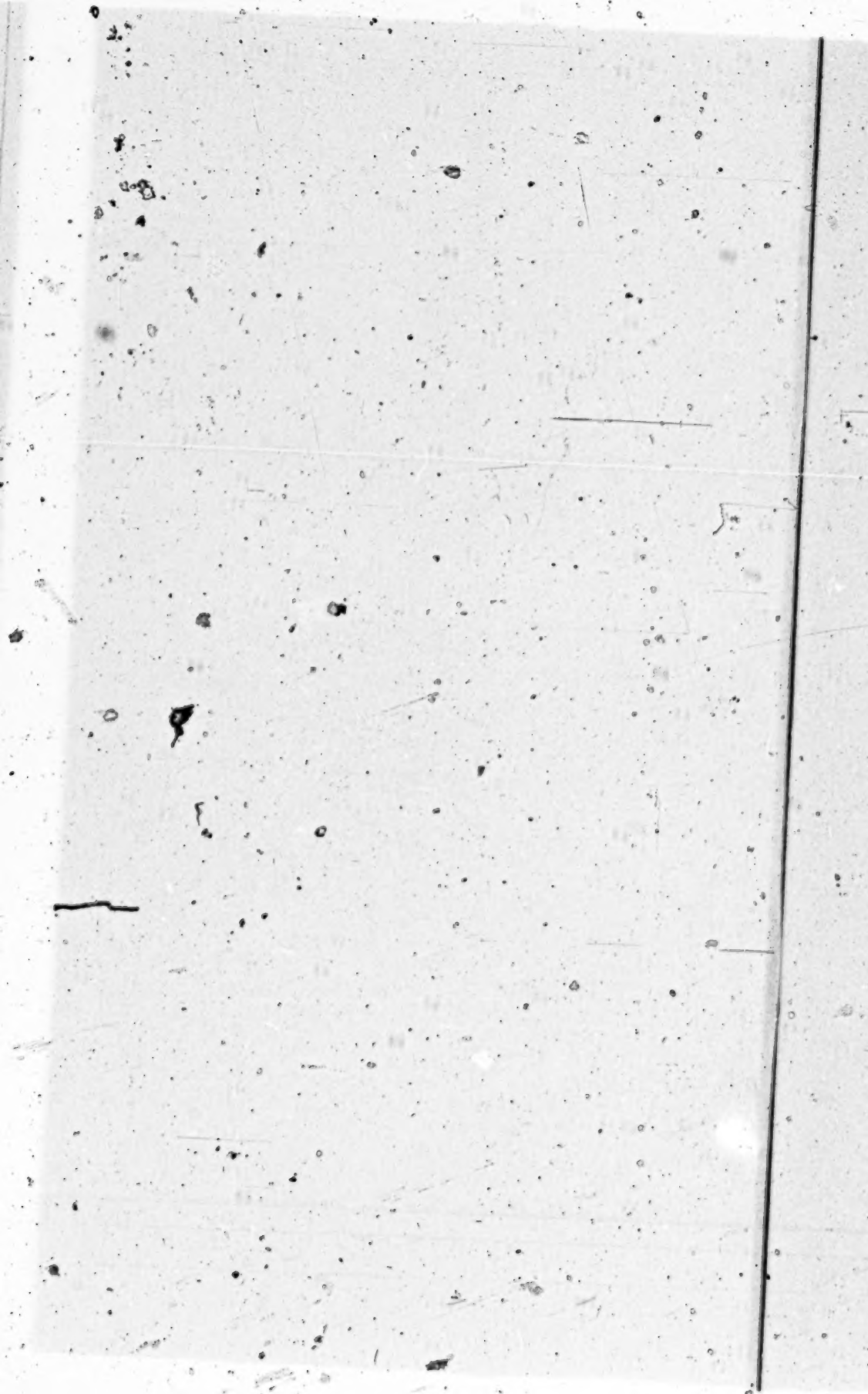

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 90–93) is reported at 187 F. 2d 802. The findings of fact and conclusions of law of the District Court appear at pages 8–14 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1951 (R. 90). The petition for a writ of certiorari was filed on June 22, 1951, and granted on October 8, 1951 (R. 93). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the detention of the respondent without bail pending the determination of his deportability was authorized by Section 20 (a) of the Immigration Act as amended by Section 23 (a) of the Internal Security Act of 1950.

2. Whether the detention of the respondent violated his rights under the Eighth or the Fifth Amendment.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deporta-

tion if an order for his deportation has been made. * * * .[8 U. S. C., Supp. IV, 156 (a).]

STATEMENT

In August 1949, respondent was taken into custody under a deportation warrant of arrest, issued on June 30, 1949 (R. 4–5), charging that he had been, after entry, a member of an organization advocating and teaching the violent overthrow of the government, and of an organization which published matter advocating such overthrow, and that he was therefore deportable under the Act of October 16, 1918, as amended (8 U. S. C. 137)[1] He was released on $2,000 bail shortly thereafter (R. 11). In October 1949, a deportation hearing was conducted under the warrant, but, as the result of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, it became necessary to grant him a new hearing (R. 77). The second hearing began September 19, 1950, but was adjourned at respondent's request (R. 9, 77). The hearing has now been completed and an order for deportation, which is now under appeal to the Board of Immigration Appeals, entered.

On October 21, 1950, shortly after the effective date of the Internal Security Act, the Assistant Commissioner of Immigration and Naturaliza-

[1] The 1918 Act has since been further amended by Section 22 of the Internal Security Act of 1950 to provide in addition for the exclusion or deportation of aliens who are or have been members of, affiliated with, the Communist Party (8 U. S. C., Supp. IV, 137).

tion sent petitioner a radiogram instructing him to apprehend respondent and detain him pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*. The arrest was effected two days later under the outstanding warrant. In a radiogram dated October 25, 1950, the Acting Commissioner confirmed the Assistant Commissioner's instructions, specifically stating that respondent was to be held without bail. (R. 11, 16–17.)

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, challenging the validity of his detention (R. 1–2). At a hearing on the writ, the following facts were adduced:

On May 25, 1949, in the course of the investigation leading to the issuance of the deportation warrant of arrest, respondent had stated under oath that he was a member of the Communist Party of Michigan and was Financial Secretary of the Hamtramck, Michigan, section of the Party (R. 52; Ex. 5, pp. 21, 22).[2] He had then stated that, at the last previous meeting of the section, they had discussed the New York Communist case, methods of raising funds for the defense thereof, and "the Chinese situation" (R. 46; Ex. 5, p. 27) and that, pursuant to instructions received from Communist Party headquar-

[2] Exhibit 5 was by stipulation included as an original exhibit before the court below (R. 89) and has or will be forwarded to this Court also as an original exhibit.

ters in New York, he had collected and delivered over $100 for the defense of that case (R. 46, 54; Ex. 5, p. 22). He had refused to state the number of persons who usually attended meetings of his unit of the Party or the names of the persons from whom he made the collections, because such information was a Party secret and he did not want to be a "stool pigeon" (R. 48; Ex. 5, pp. 23, 27). Respondent also stated at the investigation on May 25, 1949 that he attended the state convention of the Communist Party in December, 1948, as a delegate representing the Hamtramck Section of the Communist Party (Ex. 5, p. 29). The Commissioner of Immigration and Naturalization was furnished with a copy of the record of the May 1949 interrogation (R. 77).

In addition, in the 1950 deportation hearing, respondent had entered into a stipulation as to his past Communist record (R. 81, 82, 87). It appears that he was a member of the Party from 1919 to about 1938, that he was readmitted to the Party in 1947 (R. 80). Counsel for respondent also stated for purposes of the record that at the deportation hearings respondent had admitted he had been a member of the Communist Party and that he was financial secretary of the Hamtramck Section of the Communist Party (R. 88).

Respondent took the stand in support of his petition. He testified that he was employed in a cafe, later identified as the Detroit Workmen's

Cooperative Restaurant; that he owned a five-room house in Detroit, where he resided with his wife; that he had two sons, a daughter, and five grandchildren, all of whom were born in this country; that both sons served in the armed forces of the United States during World War II; that he had sold $50,000 in war bonds and donated blood seven times during that war; that he had reported regularly under the terms of his previous bail; and that he did not believe that he had violated any law since the enactment of the Internal Security Act. In addition, he testified that he would remain in this country and comply with any requirement to report as directed, if he were enlarged under bond (R. 23–26).

In denying the petition (R. 14), the District Court found, *inter alia*, that respondent's evasive demeanor on cross-examination demonstrated that he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 12); that an alien who has been free on bail pending final determination of his deportability may be rearrested and continued in custody without the issuance of a new deportation warrant of arrest (Conclusion of Law 2, R. 12); and that there had been no abuse of administrative discretion in continuing respondent in custody after his rearrest (Finding of Fact 17, R. 12).

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment, with di-

rections to grant bail in some reasonable amount (R. 90, 92, 93). It held that, in determining the question of whether to deny bail, the Attorney General could not rest on membership in the Communist Party, but was under a duty to consider primarily the likelihood that the alien would appear when ordered to do so (R. 92). The opinion states (R. 92):

> The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

SUMMARY OF ARGUMENT

I

The court below based its determination that the Attorney General had exceeded the discretionary authority granted him on the theory that bail must be granted unless there is reason to doubt that the alien will appear for future proceedings and for deportation. The court found that there was no basis for the Attorney General to doubt that the respondent would make himself available.

The position of the court below is based on a misconception of Congressional intent. The Immigration Acts, in their earlier forms, made no provision whatsoever for bail and it was not until the 1907 Act that the Attorney General was

even given authority to release an alien on bond. The Court of Appeals for the Second Circuit construed that provision to give the Attorney General wide discretion, subject to judicial review, to grant or to withhold bail and to consider a variety of factors in exercising that discretion. *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747. The Sixth Circuit on the other hand had held that the same act made the issuance of bail to aliens mandatory. *Prentis* v. *Manoogian*, 16 F. 2d 422. One of the purposes of amending Section 20 (a) in 1950 was to remove any possible doubt as to the Attorney General's discretionary authority in this respect.

Moreover, it is clear from the entire history of the Internal Security Act that Congress intended that the effect on national security should be a prime factor to be considered in determining whether to permit an alien to remain at large during deportation proceedings. Both in the introductory findings incorporated in Section 2 of the Act and in the substantive requirements, Congress made it clear that it considered Communist activity incompatible with national welfare. Therefore, the Attorney General carried out, rather than abused, the discretion given him by Congress when he determined to detain the respondent who admittedly was, or had recently been, an active member of the Communist Party and an official in the local organization of that

party. The court below was bound to accept the Attorney General's decision since it was based on admitted facts.

II

The respondent was not deprived of any Constitutional right by reason of his detention pending the determination of his deportability. It is well established that Congress has power to fix the policy for the exclusion and the deportation of aliens, that it may delegate to the executive branch of the government the duty of carrying out that policy, that deportation proceedings are not criminal in nature, but that aliens are entitled to due process of law in such proceedings.

The bail provisions of the Eighth Amendment and of the statutes relating thereto have always been considered as applicable only to criminal proceedings. Since deportation proceedings are not criminal in character, the Eighth Amendment has no application. Moreover, even if considered applicable, either directly or as an element of due process under the Fifth Amendment, the right to bail, as distinguished from protection against excessive bail, is statutory rather than Constitutional. This is true both in this country and in England from whose Bill of Rights the Eighth Amendment was derived. It is the legislature which determines whether or not bail may be granted, or must be granted, and the Constitution then forbids the exaction of excessive bail where

bail is permitted. It was therefore within the power of Congress, so far as the Eighth Amendment is concerned, to withhold an absolute right to bail in deportation proceedings.

With respect to the broader issue of whether the detention of an alien pending the determination of his deportability violates the due process clause of the Fifth Amendment, the issue has always been resolved in favor of permitting the alien to be held. This Court clearly stated that Congress had that power in *Wong Wing* v. *United States*, 163 U. S. 228, and no case which has followed has indicated a contrary result. Even those cases in which the courts have reversed the Attorney General's action on the ground of abuse of discretion have not expressed doubt as to the Constitutional power involved. Where the detention of aliens is an appropriate and necessary step in furtherance of the admittedly Constitutional Congressional policy to protect the national welfare by apprehending and deporting undesirable aliens, the Fifth Amendment does not effect a bar to such detention.

ARGUMENT

I

THE DETENTION OF THE RESPONDENT WITHOUT BOND WAS IN THE CIRCUMSTANCES OF THE CASE WITHIN THE DISCRETION GRANTED THE ATTORNEY GENERAL BY CONGRESS

The facts show that on October 21, 1950, the Attorney General ordered that the respondent be

detained without bond (R. 17) although the respondent had previously been free on a bond of $2,000 (R. 18). The timing of the rearrest, and the language of the order, make it apparent that the Attorney General was led to take the action by the passage of the Internal Security Act of 1950. The first questions to be answered in this case are: (a) what authority did Congress intend to give the Attorney General, and (b) did the Attorney General's action fall within that authority.

A: CONGRESS GAVE THE ATTORNEY GENERAL BROAD DISCRETIONARY POWER TO DETAIN ALIENS PENDING DEPORTATION, INTENDING THAT THE FACTOR OF COMMUNIST ACTIVITY BE GIVEN GREAT WEIGHT

Section 23 of the Internal Security Act of 1950 provides:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of the release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken in custody and any other

charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made.

The court below interpreted this section to mean that the discretion granted the Attorney General to retain an alien in custody is restricted to the question of the availability of the alien and that, once his availability is assured, there is no longer any area of discretion. The history of the bail provision in immigration legislation, together with the purpose, spirit and policy underlying the Internal Security Act of 1950 refute this position. Far from showing that Congress has followed a program of giving broad rights to bail in deportation proceedings limited only by the assurances of availability, the history of legislation on this subject reveals that Congress has either withheld the right to bail entirely or has given the Attorney General broad discretionary power to regulate the privilege and to grant or deny it. The legislative history of the Internal Security Act, viewed in its entirety, clearly establishes a Congressional intent that the Attorney General should give great weight to factors of national security in exercising the discretion conferred upon him.

The first provision for detention of aliens pending deportation proceedings against them appeared in the Act of 1903 (32 Stat. 1213) and directed immigration officials to take the deport-

able aliens "into custody" and deport them. No provision was made for release on bond pending determination of deportability. The authority for such detention had previously been recognized by this Court in *Wong Wing* v. *United States*, 163 U. S. 228, where in holding unconstitutional a statutory provision for imprisonment at hard labor of Chinese aliens found to be illegally in this country, this Court said at p. 235:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Thus, from the start of this country's deportation program, release pending deportation hearings has been considered an act of grace, and not of right. It was upon this assumption that Congress acted in 1907 when it first granted the right to bail pending deportation, and in 1950, when it enacted the provision of the Internal Security Act here involved.[3]

[3] Throughout the debates on the bills which were ultimately incorporated in the present act, there was constant reference to the above-quoted passage of the *Wong Wing* decision. E. g. 96 Cong. Rec. 10457, 14181; S. Rep. 2239, 81st Cong., 2d sess., p. 8.

The first provision for bail appeared in Section 20 of the Immigration Act of 1907 (34 Stat. 898) which reads:

> SEC. 20. * * * *Provided*, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

That this was deemed an act of grace is shown by the Committee Report which merely states that the proviso "seemed to your committee advisable." H. Rep. 4558, 59th Cong., 1st sess., p. 20.

This section appears not to have been judicially construed until after it was incorporated without change into the Immigration Act of 1917 (39 Stat. 890). Thereafter, a conflict developed as to the scope of the rights accorded an alien by this section. The Court of Appeals for the Sixth Circuit, in *Prentis* v. *Manoogian*, 16 F. 2d 422, held that, although in the absence of statute an alien would have no right to bail pending deportation proceedings, the statute conferred upon him a right which the administrative authorities were under a duty to grant. When the question came before the

Court of Appeals for the Second Circuit, it refused to follow the decision of the Sixth Circuit. In *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization,* 120 F. 2d 762, 765, it held, rather, that

> The natural interpretation of the language used, that the alien "may be released under a bond," would indicate that the release is discretionary with the Attorney General; * * *
>
> * * * Further, it would seem the more natural under the circumstances; for any other course *would tie the hands of the government even in restraining dangerous foreign enemies within our borders.* [Emphasis added.]

The court pointed out that "there is no absolute right to freedom under such circumstances and no occasion to construe the statute broadly and loosely to accord it."

This holding was amplified and clarified by the Second Circuit in *United States ex rel. Potash* v. *District Director of Immigration,* 169 F. 2d 747. Potash was an alien charged with being a member of an organization advocating the overthrow of the Government by force and violence who had been detained without bail pending deportation proceedings. He sought release from custody by a writ of habeas corpus. The district court dismissed the writ on the ground that the discretion vested in the Attorney General was not subject to review. The Court of Appeals reversed that holding, and ruled

that the Attorney General's exercise of discretion was subject to judicial review. The Court then stated (169 F. 2d at p. 751):

> The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, *among others*, as *the probability of the alien being found deportable*, the seriousness of the charge against him, if proved, the *danger to the public safety of his presence within the community*, and the alien's availability for subsequent proceedings if enlarged on bail. [Emphasis added.]

It pointed out, further:

> However, in ony consideration of his denial of bail it should always be borne in mind that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative determination is final. If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonable-

ness we have set forth regarding the exercise of discretion by the Attorney General are observed.

This decision was handed down on August 3, 1948, some months before the Hobbs bill (H. R. 10, 81st Cong., 1st sess.), which is the foundation of the pertinent provision in the present act, was introduced on January 3, 1949. The Hobbs bill contained in Section 3 the same language as that part of Section 23 of the Internal Security Act presently involved. The proposed language was continued in the latter part of subsection (a) as reported out by the Judiciary Committee and remained unchanged until final enactment. Its purpose was thus explained in the Committee Report (H. Rep. 1192, 81st Cong., 1st sess., pp. 5–6):

> This [existing law] has often been found to be lacking in clarity and doubtful in purpose when questions have arisen concerning procedure following arrest of an alien, or during the interim between his arrest and his hearing and decision on his case, or during the time after he is ordered deported and the accomplishment or failure of such deportation. The committee believes that this bill will greatly simplify such details.
>
> * * * The bill will expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody, or to release them under bond or on conditional parole,

> pending final determination of their deportability and for a 6-month period after an order of deportation is issued * * *. The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien and for 6 months after an order of deportation has been issued against him.[4]

It is thus evident that Congress meant to resolve the conflict between the Second and Sixth Circuit decisions in favor of the holdings of the Second, and to make crystal clear the right of the Attorney General to detain an alien in custody.[5] It is significant that the first condition in amended Section 20 (a) is the power to "be

[4] The same phraseology appears in Senate report on the bill (S. Rep. 2239, 81st Cong., 2nd sess., p. 5).

[5] This was further emphasized by statements on the floor of the Senate by Senator Humphrey during the course of debates on the McCarran Act in which, in speaking for the Kilgore amendment which changed other features of the bill but kept the provisions for detention of aliens (see 96 Cong. Rec. 14601) he said:

"The Federal courts are divided as to the right of the Attorney General to keep an alien in custody for the full period during which deportation proceedings are pending against him. The latest court decisions support the view that the Attorney General may detain the alien during this period." 96 Cong. Rec. 14486.

"This provision in the bill clarifies the decisions of the courts which were split on the question of the Attorney General's right to detain aliens during this period." 96 Cong. Rec. 14486.

continued in custody." The statute was thus intended to reaffirm the original ruling of the *Wong Wing* case that release pending deportation hearings is not a matter of right, but a matter of grace. It also clearly intended the Attorney General to have primary responsibility in determining whether an alien should be released.[6]

[6] As reported out of Committee, the Hobbs bill was also designed to preclude judicial review of the Attorney General's discretion. Subsection (g) provided that no court would have jurisdiction to release an alien detained under any provision of law relating to exclusion or expulsion at any time prior to a decision of court in his favor which was not subject to further judicial review. Of this provision, the Committee Report stated (H. Rep. 1192, pp. 10–11):

"* * * The provision is designed to leave the question of releasing an alien from custody in an immigration case entirely in the hands of the Attorney General, who is the executive officer of the Government charged with administering the immigration laws. It in no way denies the right of any alien to test the legality of his detention through the courts; it merely states that the alien cannot be released by the court until judicial proceedings have been finally terminated in the alien's favor. Had such a provision been in effect in the past, it could have been utilized to prevent the escape from this country of the notorious Communist alien, Gerhart Eisler."

In the Senate, Senator Cain through Senator Wherry introduced a bill (S. 1987) similar to the Hobbs bill which provided:

"Neither the Attorney General nor any court shall permit or order any alien to be released from custody, on bond or otherwise (except for the purpose of leaving the country)—

"(1) pending final determination of his deportability, if the Attorney General has determined that such alien either is deportable by reason of his engaging in, or his intention to engage in, any of the activities described in this sub-

While the Committee Reports are silent as to the factors to be considered by the Attorney General in exercising his discretion to detain aliens, it should be noted that the decisions of the Second Circuit, referred to above, particularly the *Potash* case only recently decided, had accorded a large area of discretion to the Attorney General and had ruled that, in exercising his discretion, the Attorney General was at liberty to consider the activities of the alien and the danger to the community. Clearly, Congress had no intention of cutting down the discretion of the Attorney General in this respect.[7]

section, or is dangerous to the security, peace, or interest of the United States; * * *."

This bill was referred to the Senate Committee on the Judiciary, but before it was reported out, the Hobbs bill passed the House and came to the Senate. The Senate Committee on the Judiciary reported out the Hobbs bill instead of the Cain bill and provided for the possibility of judicial review of an alien's detention by a three-judge court (S. Rep. 2239, 81st Cong., 2d sess., p. 9).

Since no such provision was finally enacted, we do not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse.

[7] Further evidence that Congress had in mind factors other than availability is to be gathered from the provision in Section 20 (a), as amended (*supra*, p. 2) that "*among the conditions*" for the release of an alien on bond or parole shall be the requirement that he will be produced for the hearing and for deportation. The statute before its amendment in 1950 (*supra*, p. 14) made the undertaking to produce the alien the *only condition*. The House report makes specific reference to this change and explains that it was intended to give the Attorney General "untrammeled authority to

On the contrary, the whole tenor of the act and of the debates thereon show that it was the intention of Congress that the Attorney General should give paramount consideration to questions of national security in exercising his discretion to hold an alien in custody.

Thus Representative Walter, Chairman of the Judiciary Committee of the House, in explaining the bill, stated (96 Cong. Rec. 10449-10450):

> * * * As a matter of fact, the attention of the subcommittee of which I happen to be a member was called to the case of a man who was recently sent to the electric chair after he had twice been ordered deported because of armed robberies. No particular hardship is going to be worked on anyone because, bear this fact in mind, it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power. If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.* [Emphasis supplied.]

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impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole * * *." (H. Rep. 1192, 81st Cong., 1st Sess., p. 6.) Since Congress specifically had in mind conditions other than availability in connection with the terms of a bond, it seems logical to presume that the other factors were also to be taken into consideration in determining whether a bond should be permitted.

While Representative Walter's remarks were specifically addressed to a section of the bill providing for the indefinite detention of aliens whose deportation was defeated by the refusal of foreign countries to accept them, which section was later dropped because of doubts as to its constitutionality, still they illustrate the concern felt by all the sponsors of the bill for the dangers to the country's welfare from subversive aliens not confined during the course of deportation proceedings. Similarly Representative Stefan of the Judiciary Committee spoke of the danger of alien-subversive-Communists "wandering over our country at will." He said (96 Cong. Rec. 10453):

> The present immigration laws, with reference to the detention and deportation of undesirable aliens, are grossly inadequate. The hands of American authorities are tied; the evil work of the Communists aided and abetted. The Communists, as might be expected, have played—and are still playing—this loophole in the internal security laws of the United States for all it is worth. They realize that once the foreign agent arrives in this country, nine-tenths of the battle is won. Even if he is identified and exposed, well, getting him out is a tedious, and in some instances, an unsuccessful fight. Even though he has been proven a menace to our country, under our present laws, he cannot be placed in detention quarters continuously until deportation, but may be released on bond. As long as he is in this

> country he is still available for use by the enemy. The continued presence of these undesirable aliens in this country represents an alarming danger to our national security.

Moreover, as finally enacted, the measure here under consideration is part of the Internal Security Act of 1950, passed because Congress was convinced that there was imminent danger to the nation from Communist activities. The act amended the Immigration Act of 1917 to provide in Section 22 that membership in the Communist Party is *per se* a ground for deportation (8 U. S. C., Supp. IV, 137). This represents a Congressional finding that membership in the Communist Party in and of itself renders an alien undesirable as a resident of this country and constitutes a mandate to the Attorney General to remove such alien as speedily as possible. As to the danger from Communism, Congress, in Section 2 of the Act, made its findings, in part as follows:

> (1) There exists a world Communist movement which, in its origins, its developments, and its present practice, is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictator-

ship in the countries throughout the world through the medium of a world-wide Communist organization.

* * * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide con-

spiracy and designed to prevent it from accomplishing its purpose in the United States.

When the provision for bail in Section 23 of the Internal Security Act, with its emphasis on the right of the Attorney General to hold an alien in custody pending hearing, is read in the light of the Internal Security Act as a whole, with its emphasis on the danger to the country from subversive Communist activities and the necessity of expelling alien Communist Party members, we submit that it cannot fairly be interpreted otherwise than as a direction to the Attorney General, when exercising his discretion to grant or withhold bail, to give great weight to the nature and extent of their activity in Communist affairs.

B. THE ATTORNEY GENERAL'S ORDER THAT THE RESPONDENT BE DETAINED IN CUSTODY WAS WELL WITHIN THE DISCRETIONARY AUTHORITY GIVEN HIM BY CONGRESS

The District Court found as a fact that the respondent was an active communist and an official in a local communist organization (R. 11, 12). The court also found as a conclusion of law that the Attorney General had not exceeded the discretion granted him (R. 13). The court below did not reach a different conclusion on the facts and its finding of abuse of discretion was squarely based on the concept that the future availability of the respondent was the crucial factor in granting or refusing bail (R. 92).

Therefore, if our position in the preceding portion of this brief is correct, namely that Congress intended the Attorney General to give great weight to the dangers to the country from the continued activities of communist aliens at large during deportation proceedings, there is no reason to believe that the court below, had it accepted that premise, would have reached a different conclusion than the Attorney General and the district court.

Even before Congress strengthened the authority of the Attorney General by amending Section 20 of the Act, the courts had made it clear that the primary responsibility for reaching a determination on bail rested with the Attorney General and "that the court's opinion as to whether an alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative decision [was] final." *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747, 751–752 (C. A. 2). By amending the Act Congress must have intended to spell out the authority so clearly that no court could misunderstand.

There is no dispute as to the underlying facts in this case. Admittedly the respondent had been a member of the Communist Party and an officer of his local unit. He had participated actively in

the affairs of the party for many years. The evidence convinced the District Court that his membership continued to the very time of the hearing before it, and the respondent admitted membership as late as 1949. In view of the Congressional findings as to the danger to the national welfare arising from such activities, no court could fail to find that there was a logical basis for the Attorney General's exercise of discretion.

But even on the issue as posed by the court below, the fact that the respondent has heretofore put in an appearance at hearings is no basis for assuming he will continue to do so. At the time of prior stages in the proceeding when he had not failed to appear, the deportation statute had not been amended to make membership in the Communist Party *per se* a ground for deportation.[8] Moreover, prior to the enactment of the Internal Security Act, it was well known that aliens from "iron-curtain" countries[9] could not be deported despite orders of deportation against them. Thus, the eventuality of the respondent's actually being deported was vastly increased by the passage of the new law. Nor can respondent's own statements of his intentions be accepted at face value; the decision as to whether or not to appear may well be dictated to him by others since, as Con-

[8] The Internal Security Act became law on September 23, 1950. The prior deportation hearings at which respondent had appeared were held in October 1949, and on September 19, 1950.

[9] The respondent entered the country from Poland (R. 23).

gress found in Section 2 (15) of the Internal Security Act, membership in the Communist Party is "rigidly and ruthlessly disciplined."

II

THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE DETENTION OF THE RESPONDENT PENDING A DETERMINATION OF HIS LIABILITY TO DEPORTATION

This Court has frequently been called on to determine the extent to which the Constitution limits the application and implementation of Congress' acknowledged power to exclude and expel aliens. The majority and dissenting opinions in *Fong Yue Ting* v. *United States*, 149 U. S. 698, which was concerned with the validity of a registration requirement to make effective the Congressional policy of excluding Chinese under the Exclusion Act of 1892, might well serve as brief and reply brief in the present case. As here, the essence of the problem was the reconciliation of an attempt by Congress to provide an effective method of protecting the national interest with the protection of the personal rights of the particular aliens involved.[10]

From the many cases upholding the power of the nation to protect itself, while at the same time reasserting the determination to give even the

[10] An earlier example of the same problem which did not reach the courts arose in connection with the Alien Act of June 25, 1798 (1 Stat. 570) which was vigorously attacked by Jefferson and Madison (See, e. g., 4 Elliot's *Debates*, p. 554).

nation's worst enemies their full measure of due process, there have emerged certain concepts which can be accepted as established:

1. Congress has the absolute right to determine what aliens may enter this country, and, once here, what aliens shall be subject to deportation. No alien gains a vested right to remain in this country because of his admission or residence here. *Fong Yue Ting* v. *United States*, 149 U. S. 698, at 710–1; *Chae Chan Ping* v. *United States*; 130 U. S. 581.

2. Deportation proceedings against aliens are not criminal in character (*Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275), but the effect of a deportation order on the personal life of an alien is so serious, even though it is not inflicted as a punishment, that the human rights involved deserve the fullest protection. See *Jordan* v. *De George*, 341 U. S. 223, 231; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

3. Aliens within our borders are entitled to due process of law in the conduct of deportation proceedings against them. (*The Japanese Immigrant Case*, 189 U. S. 86).

4. Due process of law in deportation proceedings does not require that the status of aliens be adjudicated by the courts; Congress has the constitutional power to vest the final determination on deportability in the executive branch of the Government. *Nishimura Ekiu* v. *United States*,

142 U. S. 651; *Zakonaite* v. *Wolf*, 226 U. S. 272.

5. The executive branch of the Government in carrying out its functions in deportation-proceedings must afford aliens a fair hearing with an opportunity to meet the charges against them. *The Japanese Immigrant Case*, 189 U. S. 86; *Vajtauer* v. *Commr. of Immigration*, 273 U. S. 103.

It is in the light of these concepts that it must be determined whether or not the detention of the respondent, pending the determination of his deportability, was an infringement of any of his constitutional rights and specifically of his rights under the Eighth and Fifth Amendments.

A. THE EIGHTH AMENDMENT DOES NOT REQUIRE THAT THE RESPONDENT BE RELEASED ON BAIL

It has been uniformly held that the bail provisions of the Eighth Amendment and of the implementing legislation [11] apply only to criminal

[11] Even before the adoption of the Constitution the Confederate Congress provided in Article II of the Ordinance of 1787 for the Northwest Territory as follows:

"All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great" (U. S. C. 1946 Ed., p. XXXIV).

Then in 1789, Congress provided in Sec. 33 of the Judiciary Act:

"* * * And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law." (1 Stat. 91.)

cass. *Ex parte Watkins*, 7 Pet. 568, 573; *In re Lum Poy*, 128 Fed. 974, 975 (C. C. D. Mont.); *In re Ah Tai*, 125 Fed. 795, 796–7 (D. Mass); *Ex parte Perkov*, 45 F. Supp. 864 (S. D. Cal.); *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 951 (C. A. 2).

There is a reasonable basis for this distinction between criminal and noncriminal proceedings since the basis for allowing bail in criminal proceedings is to avoid the punishment of a defendant before he has been adjudged guilty and even thereafter, pending review by the appellate courts, where any substantial question persists. See *Stack* v. *Boyle*, No. 400, decided November 5, 1951; *Hudson* v. *Parker*, 156 U. S. 277, 285; *United States* v. *Motlow*, 10 F. 2d 657, 662 (Opinion by Mr. Justice Butler sitting as Circuit Justice in the Seventh Circuit); *Williamson* v. *United States*, 184 F. 2d 280, 284 (Opinion by Mr. Justice Jackson sitting as Circuit Justice in the Second Circuit). In noncriminal cases punishment is not the ultimate objective, and detention before final conviction cannot therefore be considered an anticipation of a punishment which has not been finally imposed.

At the present time the provision as to bail is found in Section 46 (a) of the Rules of Criminal Procedure, which provides:

"1. *Before Conviction.*—A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Deportation proceedings have consistently been held not to be criminal in character. The fundamental nature of such proceedings has been well stated by this Court in *Fong Yue Ting* v. *United States,* 149 U. S. 698, at pp. 709 and 730:

> "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.
>
> * * * * *
>
> The proceeding [under Chinese Exclusion Act of 1892] before a United States judge, as provided for in section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.

And in *Wong Wing* v. *United States,* 163 U. S. 228, this Court refused to permit imprisonment at hard labor in connection with deportation proceedings, but upheld the right to detain and deport as not involving a punishment. and

characterized the proceedings as not being criminal in character. See also *United States ex rel. Potash* v. *District Director of Immigration and Naturalization*, 169 F. 2d 747 (C. A. 2); *Prentis* v. *Manoogian*, 16 F. 2d 422 (C. A. 6); *Chin Wah* v. *Colwell*, 187 Fed. 592 (C. A. 9); *Principe* v. *Ault*, 62 F. Supp. 279 (N. D. Ohio); *United States ex rel. Fook Tong* v. *Watkins*, 58 F. Supp. 906 (S. D. N. Y.); *United tSates ex rel. De Cicco* v. *Longo*, 46 F. Supp. 169 D. Conn.); *Ex parte Perkov*, 45 F. Supp. 864 (S. D. Cal.); *United States ex rel. Ioannis* v. *Garfinkel*, 44 F. Supp. 518 (W. D. Pa.); *In re Ah Tai*, 125 Fed. 795 (D. Mass.).

However, even it it were held that the Eighth Amendment did apply to deportation proceedings in the same manner that it applies to criminal proceedings, or that, though not specifically applicable, the same limitations apply by reason of the due process clause of the Fifth Amendment, still the statutory provision authorizing the Attorney General to hold aliens without bond in these cases would not be unconstitutional.

The specific language of the Eighth Amendment relating to bail is:

> Excessive bail shall not be required, * * *.

This provision is patterned after the comparable provision in the English Bill of Rights of 1688, "That excessive baile ought not to be required" (1 Wm. & M., ch. 2, 1688). It is obvious that neither of these provisions is operative by itself but must be read in conjunction with statutory

requirements defining the situations in which offenses are bailable. The statutes in England have varied from time to time in this respect. At the time of the adoption of the English Bill of Rights the Statute of Westminister (First), 3 Ed. 1, ch. 15 (1275), listed a considerable number of offenses in which not only was bail not required to be granted but in which the granting of bail was actually prohibited.[12] The Indictable Offenses Act, 1848 (11 and 12 Vict., c. 42, S. 23),

[12] Petersdorff *On Bail* (1824) quotes this statute at pages 477–478 as follows:

"It was accordingly provided, that prisoners outlawed, abjurors of the realm, provers, those taken with the manour, breakers of the king's prison, thieves openly defamed, those appealed by provors (so long as the provors are living,) those taken for house-burning, for false money, or for counterfeiting the king's seal, persons excommunicate, taken at the request of the bishop; or for offences manifest, or traitors to the king, shall not be bailable; but such as be indicted of larceny by inquests before sheriffs or bailiffs, or of light suspicion, or for petty larceny under twelve pence (if not guilty of larceny aforetime,) or guilty of receipt of felons, or of commandment or force, or of aid of felony done; or guilty of any other trespass, for which one ought not to lose life or member; and persons appealed by provor, after the death of the provor, shall be bailable by sufficient surety, whereof the sheriff shall be answerable: and if the sheriff, or any other, let persons not bailable go by surety, and be thereof attainted, he shall lose his fee and office forever; and if any under-sheriff, constable, or any other bailiff of fee, do so contrary to the will of his lord, they shall be imprisoned three years and make fine at the king's pleasure; and if any withhold prisoners bailable, after they have offered sufficient surety, he shall pay grievous amerciament to the king, and if he take reward for it, he shall pay the prisoner double, and make fine to the king."

which is still the law, requires bail only in the case of misdemeanors and gives discretion to grant or withhold bail for most indictable offenses.[13]

In this country Congress has exercised the same power to withhold bail as a matter of right by providing that in the case of crimes punishable by death the grant of bail shall be discretionary. See fn. 11, supra, p. 30.

[13] This statute provides (5 Halsbury's Statutes of England (2d ed., 1948), p. 679):

"Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace *may, in his discretion, admit* such person to bail * * *; and where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, *shall admit* him to bail in manner aforesaid * * *: Provided nevertheless, that no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of her Majesty's Secretaries of State, or by her Majesty's Court of Queen's Bench at Westminster, or a judge thereof in vacation." [Emphasis supplied.]

Since the policy as to what offenses shall be bailable is one for the legislature both in this country and in England, there does not appear to be any constitutional reason why Congress should not have extended the area of cases where bail is not a matter of right to other situations where it is believed the public interest required that bail be considered a matter of discretion. This right of Congress has been recognized by the courts. See *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 952 (C. A. 2): "The power to admit to bail is not a mere matter of practice. In the United States the right to bail is thought to be dependent on statutes." (See also *United States* v. *Delaney*, 8 F. Supp. 224 (D. N. J.); *In re Hanoff*, 39 F. Supp 169 (N. D. Cal.); *Ex parte Perkov*, 45 F. Supp. 864, 867 (S. D. Cal.))

Therefore, even if the Eighth Amendment were considered to apply to deportation proceedings in the same manner that it applies to criminal proceedings, such application would not impose a bar to action by Congress placing the discretion to grant or refuse bail in the hands of the Attorney General; it would only prevent the imposition of excessive bail in a situation where release on bail is mandatory.

B. THE FIFTH AMENDMENT DOES NOT PREVENT THE CONTINUED DETENTION OF RESPONDENT PENDING DETERMINATION AS TO HIS DEPORTABILITY

The argument on the Fifth Amendment, as we understand it, is that, wholly apart from any right

to bail as such, the detention of the respondent prior to a determination that he is deportable is a deprivation of his liberty without due process of law. There is no question but that the due-process clause of the Fifth Amendment is applicable to deportation proceedings, and the question is whether due process requires an alien communist to be left free on bond between the date of his original arrest and the date he is ordered deported or is in fact deported."

The right to detain an alien in connection with a deportation proceeding was specifically considered by this Court in connection with the Chinese Exclusion Act of 1892 (27 Stat. 25). In *Wong Wing* v. *United States*, 163 U. S. 228, this Court stated at page 235:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while

---

" We do not understand that in this case the problem is one of the fairness of the proceeding, since the respondent has been given a full hearing before an immigration examiner, in which hearing, under the applicable regulations, he had notice of the proceeding and of the charges against him; the right to counsel, the right to introduce evidence, and the right to cross-examine witnesses produced against him (See 8 C. F. R. (1949 ed.), Section 150.4–150.6).

> arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

This statement was made with respect to a statute which gave the alien no specific right to bail in any case whatsoever. The law was therefore much harsher than the provision of the Immigration Act now before this Court where bail may be granted in appropriate cases.

The Immigration Acts did not include a provision specifically permitting bail until the Act of 1907 (34 Stat. 898), although the Act of 1903 (32 Stat. 1213) contained a provision which required immigration officials to take certain aliens into custody for deportation. No one questioned the right of Congress thus to permit aliens to be arrested and detained without bail pending determination of their deportability. Without considering it necessary to comment on the validity of denying bail to aliens in deportation proceedings, the court, in *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization*, 120 F. 2d 762 (C. A. 2), simply stated, at p. 765, that "before 1907, no right to bail existed in these proceedings."

In 1907 the Immigration Act included the following provision for bail, which was continued in the 1917 Act and only recently amended by the Internal Security Act of 1950, Section 23:

> Sec. 20. * * * pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor * * *[15]

The leading case interpreting this provision is *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747 (C. A. 2). In this case, the Court determined that the Attorney General was given discretion to grant or refuse bail, but that his exercise of that discretion was subject to review by the courts. It is interesting to note that the Court seemed to accept without question the proposition that the grant of such discretion to hold the alien prior to final determination raised no serious constitutional issue. The Court stated at page 752:

> If the Eighth Amendment of the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed.

---

[15] As is pointed out at p. 14, *supra*, the legislative history of this provision does not indicate that it was included because of any belief that the Constitution required it.

And even in *Prentis* v. *Manoogian*, 16 F. 2d 422 (C. A. 6), which interpreted the 1917 Act as making the right to demand bail mandatory, that conclusion was reached as a result of statutory construction rather than on any ground that the Constitution gave the alien such a right.

Coming now to the cases involving the bail provisions of Section 23 of the Internal Security Act of 1950, even the court below did not reach its conclusion on the constitutional ground. The court held that the Attorney General abused his discretion, not that Congress had no constitutional power without infringing due process to give him the discretion to withhold bail. Similarly, in *United States ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16 (C. A. 8), a petition for a writ of certiorari with respect to which is now pending, the Eighth Circuit's position was consistent with that of the Sixth in the current case in that no substantial constitutional question was considered as involved. And, finally, in *Carlson* v. *Landon*, 187 F. 2d 991 (C. A. 9), now pending before this Court on certiorari, the court of appeals, in upholding the discretion of the Attorney General, did not find that there was a sufficiently substantial constitutional question to require discussion.

It is submitted that the position uniformly taken by the courts on bail in deportation proceedings is sound. Once it is established that there is no deprivation of liberty without due process of law involved in a deportation order

itself, it seems to follow that the collateral but lesser function of detaining an alien in custody in order to make effective a proceeding to determine his deportability follows as a matter of course. Compare *Fong Yue Ting* v. *United States*, 149 U. S. 698.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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NOVEMBER 1951.

[16] There is not in issue in this case any abuse of discretion by the Attorney General in detaining the alien for an unreasonable or unnecessary time. Such an abuse might well constitute abuse of due process and justify a court in granting habeas corpus. Compare *United States ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.). As a matter of fact, any delay in the current proceedings has been occasioned in order to meet the convenience of the respondent (R. 77).

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OCTOBER TERM, 1951

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v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

The respondent has raised certain points which are not treated in petitioner's main brief. These points are entirely collateral to the main issues involved in this and the *Carlson* case and were not relied on by the court below.

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I

THE FACT THAT THE RESPONDENT HAD BEEN RELEASED ON BOND DID NOT BAR HIS REARREST AND SUBSEQUENT DETENTION WITHOUT BOND

The respondent argues that the Attorney General, having released him on $2,000 bond, had exhausted his power under the original warrant and had no authority under the statute to rearrest and detain him thereafter. He draws an analogy to certain criminal cases in which an arresting officer has been held to have exhausted an arrest warrant by exercising it (Br. 4–5). This argument misconceives the nature of a warrant in the immigration procedures.

An examination of the warrant makes it clear that the document is in the nature of a pleading as well as an authority to arrest (R. 4–5). It is in fact the complaint in the proceeding and continues in effect throughout the proceedings. This dual nature of the document has been recognized by the courts. *United States* v. *Karnuth*, 108 F. 2d 178 (C. A. 2).[1] Thus it is obvious that the effect of the original warrant is not exhausted by taking the alien into custody.

The second arrest of the alien in this case was made pursuant to the order of the same Assistant Commissioner, Enforcement Division, of the

[1] This Court has recognized the right to continue an alien in custody under the original warrant even after a deportation order has been held invalid. *Wong Yang Sung* v. *McGrath*, 339 U. S. 908.

Immigration and Naturalization Service, who issued the original warrant (R. 17). Thus, if further authority to the District Director was required in order to rearrest the respondent, it was provided by this direction which is in effect a telegraphic warrant of arrest.

To argue that there was no power to rearrest is in effect to argue that the Attorney General had no authority to revoke bail once it had been granted. Yet, as the respondent's own brief points out, the release of an alien on bail is merely a modified form of detention, transferring the custody to the surety (Br. p. 5, fn. 2). Therefore, there was no surrender of jurisdiction over the person of the alien, and the rearrest merely constituted a further modification of that custody. To read the language of the statute, which provides that an alien may "be continued in custody," as denying authority to the Attorney General to modify or revoke an order releasing an alien on bail, is wholly inconsistent with the purposes of the statute. The only question was whether such action was an abuse of discretion, the issue which we discuss at length in our main brief.

II

RESPONDENT'S COMMUNIST ACTIVITY WAS SUFFICIENTLY SUBSTANTIATED IN THESE PROCEEDINGS

(a) The respondent's attack on the procedures followed in the preliminary investigation of May

25, 1949 (Br. 2–3), at which time respondent admitted his Communist record, is gratuitous since in a subsequent hearing which respondent does not attack, the same admissions were made (R. 80, 81, 82, 87, 88). However, lest the Court be misled into assuming from our silence that the statements made on pages 2 and 3 and in footnote 1 of respondent's brief are admitted, it is denied that there were any irregularities in the May 25, 1949, investigation. The respondent was not arrested but merely questioned and he was informed that his answers must be voluntary (Ex. 5, p. 1). Although no counsel was present, since the matter was in the preliminary stage of inquiry, it is the practice of the Immigration Service to permit counsel to be present at such investigations if the alien requests it. The alien was informed that any answers he made could be used against him (Ex. 5, p. 1). The statements, in respondent's brief, that the respondent was forced to sign an admission that he had been a Communist in order to obtain his release are in error or are immaterial to this case since the only statement here involved is the investigation which appears in this record as Exhibit 5, and which was *not* signed by the alien (Ex. 5, p. 37).

(b) The respondent attacks the district court's finding, that the petitioner was a Communist, on the ground that it was improperly deduced from the alien's claim of privilege against self-incrimination. This has reference to the court's find-

ing (No. 16) that the alien was "evasive" (R. 12). But the court's comment on the "evasive demeanor" of the witness obviously relates not to his claim of privilege but to his repeated statements that he could not remember, when he was asked concerning his prior testimony (R. 42–67). The court of appeals, which recognized his right to claim the privilege, stated, "It is undeniably true that appellant was, before his original arrest, a member of the Communist Party and was financial secretary of the Hamtramck Division of the Communist Party of Michigan for the year 1949 * * * ."

CONCLUSION

It is respectfully submitted on the basis of the foregoing that the judgment of the court below should be reversed.

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Petitioner,

vs.

JOHN ZYDOK,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT-APPELLEE

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Cases Cited

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Kushnir and Lichota v. Jordan, 50 C. 1528, U. S. D. C., N. D. Ill., E. Div., No. 10, 1950, LaBuy, J. 7

Lucas v. Ault, 27806, U. S. D. C., N. D. Ohio, E. Div., Nov. 20, 1950, Fried, J. 7

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BRIEF FOR RESPONDENT-APPELLEE

Jurisdiction

The Brief for the Petitioner (p. 1) correctly sets forth the jurisdiction of this Court.

Questions Presented

(1) Whether the Attorney General abused his discretion in rearresting on October 23, 1950, respondent who had theretofore been released on $2,000 bail in deportation proceedings instituted against him, and thereafter holding him without bail on the basis of two radiograms and without legal process of any kind;

(2) Whether respondent had the right to refuse to answer questions put to him with reference to his membership in the Communist Party;

(3) Whether the respondent on such rearrest had the burden of going forward with proof that the Attorney General had abused his discretion or was such burden upon the Attorney General;

(4) Whether the respondent, an alien in a deportation proceeding, has a constitutionally protected right to bail during the pendency of such proceedings.

Statute Involved

The pertinent part of the applicable statute appears in the Brief for the Petitioner (p. 2).

Statement

The statement in the Brief for the Petitioner is accurate and satisfactory except for the following:

(1) The Brief for the Petitioner states (p. 4) that the respondent's arrest was effected on October 23, 1950 "under the outstanding warrant." There is nothing to establish that in fact it was under the warrant that the arrest was made and that his arrest and detention was not solely on the basis of the two radiograms sent by the Central Office to the District Office (Exhs. 2 and 4, R. 17).

(2) The statement of May 25, 1949—Exhibit 5—forwarded to this Court as an original exhibit (Brief for the Petitioner, footnote 2), in which respondent made certain admissions, was not properly before the district court for the following among other reasons: It was taken in the absence of counsel; respondent made the statement in the office of the Immigration and Naturalization Service, to which he had been physically transported more than a

month before the warrant of arrest issued (R. 5); he said what he did not voluntarily but because he thought that he would be released only if he admitted Communist Party membership.[1] Accordingly, questions based on Exhibit 5 and statements therein contained could not properly be relied upon to sustain the respondent's detention without bail.

---

1 We quote from the stenographic record of the 1949 deportation hearing:

A. May 25, I was arrested by United States Immigration Service man. I was brought here and they gave me, to the room, supper. They was questioning me. I went for four hours or something. And then force me to sign separate blank "I member of Communist Party," and then they let me go. (p. 118)

* * *

Q. And you said you were forced to sign a statement. What do you mean you were forced to sign a statement? A. I mean—at least I thought so—if I didn't sign, you wouldn't let me go out. (p. 119)

* * *

Q. Did anyone tell you that you had to sign a statement before you could go home? A. That's right.

Q. Who told you you had to sign the statement before you could go home? A. I don't know their name but that inspector, or how they call, was questioning me.

Q. Isn't it a fact that you made that statement voluntarily and signed it in the presence of witnesses? A. I don't get that question.

The Examining Inspector: Will you read the question back?

(The question was read by the reporter.)

The Witness: No. (pp. 120-121)

* * *

The Witness: The question was did I sign that voluntarily. Voluntarily I don't sign, but they call me from other room and say, "O. K., you sign that before you go home". That is what I thought: before I sign this, I can't go home. That is why I sign it.

Q. (By the Examining Inspector) You just thought you couldn't go home? No one told you you couldn't go home? A. Yes, it was told to me, "Sign that statement. Then, O.K., you can go home."

Q. And you signed it voluntarily; is that correct? A. I won't sign if I know I got right not to sign; but I thought, "I have to sign, because they don't let me go."

Q. No one told you you had to sign it; isn't that correct?

Mrs. King: I think I am going to object to this as repetitious.

The Presiding Inspector: Well, not the last question. I will overrule the objection to the last question.

The Witness: Well, I think my question is answered.

The Examining Inspector: I want to repeat the question.

Q. (By the Examining Inspector) No one told you you had to sign the statement, did they? A. I was told, "Sign that statement. Then you can go home." (pp. 121-122)

(3) The Brief for the Petitioner alleges (p. 6) that in denying respondent's petition the district court found "that respondent's evasive demeanor on cross-examination demonstrated that he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 12)", without referring to respondent's claim to constitutional immunity from self-incrimination (R. 31-40) with reference to such Communist Party membership. This the Court of Appeals upheld (R. 93). Accordingly thereafter any references to conclusions reached by the district court on the basis of respondent's "evasive demeanor" should not have been referred to by petitioner and are not properly before this Court.

(4) The suggestion in the Brief for the Petitioner (f. 16) that there was delay in the deportation proceedings because of respondent's request for adjournment is misleading in view of the fact that respondent's case was argued before the Board of Immigration Appeals on May 17, 1951 and has not yet been decided.

ARGUMENT

I.

The Attorney General abused his discretion in rearresting respondent.

In the warrant of arrest issued June 30, 1949 (R. 5), it was specified that "Authority has been granted for release under bond in the sum of $2,000" (R. 5). Thus the Attorney General in the exercise of his discretion had fixed the bail at that figure, and in the absence of compelling proof to the contrary this should be regarded as appropriate (*Potash* v. *District Director*, 169 F. 2d 747, C. A. 2nd

Circ., 1948). In August 1949 respondent was taken into custody and released on that bail (Brief for Petitioner, p. 3). Thereafter he could not be rearrested because (1) the statute (Brief for the Petitioner, pp. 2-3) provided only for the alien to "be continued in custody"; (2) the warrant of arrest was exhausted as an arresting instrument (22 C. J. S., 482; *In re Broadhead*, 74 Kans. 401; *United States* v. *Ebbs*, 49 Fed. 149).

To have authorized rearrest, a new warrant should have been issued, *cf.* companion case of *Carlson* v. *United States*, Docket No. 35, R. 44 and 47, *Ex parte Sentner*, 94 F. Supp. 77, *Matter of Stess*, Civ. No. 5154, D. C., E. D., Wisc. Nov. 17, 1950, TEHAN, *J.*, unreported.

But aside from these technicalities, the Attorney General had already exercised his discretion and rearrest and detention without bail of the same non-citizen in the absence of any additional facts but merely upon the basis of enactment of a statute was not the exercise but the abuse of discretion.[2]

On or about October 23, 1950, some fifty non-citizens were taken into custody and held without bail on instructions received by radiogram from the Central Office of the Immigration and Naturalization Service to the effect that they should be arrested and detained under and pursuant to Section 23 of the Internal Security Act of 1950. Since then all such non-citizens have been released.[3]

In these cases the facts were substantially the same. In each instance the non-citizen, like the respondent, had been

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2 The Brief for the Petitioner (p. 13) places great emphasis on the *Wong Wing* case. Neither that case nor the dictum quoted from it purports to justify detention without the allowance of bail in a deportation case. Enlargement on bail is no less detention; it merely transfers custody from the Immigration Service to the surety. (*Taylor* v. *Taintor*, 16 Wall. 366, 371.)

3 The last to be released were Carlson et al. released by this Court, April 30, 1951 (341 U. S. 918) pending the granting of their certiorari petition.

arrested under a warrant charging him with being deportable under the Act of October 16, 1918 as amended (8 U. S. C. §137) and in almost every instance because he was or had been a member of the Communist Party. In each instance the non-citizen, like the respondent, had been released under bond in varying amounts conditioned upon his appearing for hearing or hearings or for deportation. In each instance the non-citizen, like the respondent, was rearrested on instructions from the Central Office of the Immigration and Naturalization Service and without any additional warrant or other document authorizing detention.

In each of the instances exclusive of the four non-citizens involved in *Carlson et al.* v. *United States* (Docket No. 35, October Term, 1951), the court held the Attorney General abused his discretion. We list below the various decisions on habeas corpus—information concerning which has in many instances been received merely from the attorney—and, where available, the court, date and docket number under which the decision is identified. The Service contested each release and their files will establish the accuracy of every case reported.

The names of long resident aliens against whom deportation proceedings were pending, who were released on bail by way of habeas corpus, follow:

Heikkinen v. *Gordon*, 190 F. 2d 16, C. A. 8th Cir., 1951;

Zydok v. *Butterfield*, 187 F. 2d 802, C. A. 6th Cir., 1951;

Mangaoang v. *Boyd*, 186 F. 2d 191, C. A. 9th Cir., 1950;

Klig v. *Shaughnessy*, 94 F. Supp. 157, 1950;

Ex parte Sentner, 94 F. Supp. 77, 1950;

Matter of Hilty and Stess, No. 5153 and No. 5154 U. S. D. C., E. D. Wis., Nov. 17, 1951, TEHAN, *J.*;

In re Estrada, Civ. 4125, U. S. D. C., N. D. Tex., Dallas Div., Oct. 28, 1950, ATWELL, *J.*;
Warhol v. *Shrode,* 94 F. Supp. 229;
Podolski v. *Baird,* 94 F. Supp. 294;
Schlossberg v. *Ault,* 27805, U. S. D. C., N. D. Ohio, E. Div., Nov. 20, 1950, FRIED, *J.*;
Lucas v. *Ault,* 27806, U. S. D. C., N. D. Ohio, E. Div., Nov. 20, 1950, FRIED, *J.*;
Papandreou v. *Butterfield,* 9908, U. S. D. C., E. D. Mich., S. Div., Nov. 6, 1950, LEDERLE, *J.*;
In re Yanish, No. 30114, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
In re Fox, No. 30115, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
In re Heikkila, No. 30126, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
Andrulis, Resnikoff and Keller v. *Jordan,* 50 C. 1509; U. S. D. C., N. D. Ill., E. Div., Oct. 30, 1950, CAMPBELL, *J.*;
Kushnir and Lichota v. *Jordan,* 50 C. 1528, U. S. D. C., N. D. Ill., E. Div., Nov. 10, 1950, LABUY, *J.*;
In re Sassieff, No. 2641, U. S. D. C., N. W. Wash., N. Div., BOWEN, *J.*;
In re Kemenovich, No. 9179, U. S. D. C., W. D. Pa., Nov. 1, 1950, BURNS, *J.*;
MacKay v. *Butterfield,* Civil 1220, U. S. D. C., N. D. Ind., Nov. 17, 1950, SWYGERT, *J.*

The government has recognized as it could not but do that the courts have generally ordered release. Thus in Progress Report No. 2 to the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong. 1st Sess., Mr. Stanley A.

Diana, Chief of the Detention, Deportation and Parole Section of the Immigration and Naturalization Service was quoted as having testified:

"Mr. Diana: Fifty. In all, 50 were taken into custody.

• • •

Mr. Arens: May I ask you this: Why didn't you dip down and pick up the nonleading Communist aliens?

Mr. Diana: We thought we would do this: We would first take the leading Communists, and see what determinations the courts would make in our continued detention of those cases, and as soon as we would learn of their decisions, we then would go out and pick up all that we could. However, the courts did not decide in our favor.

• • •

Mr. Diana: On October 21, 1950, the field offices were specifically instructed to take into custody immediately, and detain, all active Communists, under proceedings, and in whose cases the orders of deportation had not been outstanding for a period of more than 6 months. In all, 50 aliens were taken into custody.

One was released because of his recent and continuing cooperation. All of the other 49 applied for writs of habeas corpus, with the result that all but 5 were released by the courts. In these five cases, the aliens are appealing.

And I now understand • • • that they were recently released by the Supreme Court pending a decision on their appeal.

Mr. Arens: That is the five?

Mr. Diana: Yes." (p. 57)[4]

Prior to and since these recent arrests under the Internal Security Act, the federal courts have made it quite plain that detention of Communists without bail merely because of their political opinion or association would not be sustained:

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4 Only four (cf. Record on Appeal, Carlson et al., October Term, 1951, No. 35) went up to the Supreme Court. The fifth, Knut Heikkinen was released by the Court of Appeals for the Eighth Circuit (*supra*) and in that case the Solicitor General has applied for certiorari (Oct. Term 1951, No. 334).

Stack v. *Boyle*, U. S. Supreme Court, Docket No. 400, Nov. 5, 1951;

Potash v. *District Director*, 169 F. 2d 747, C. A. 2nd Cir., 1948;

Pirinsky v. *Shaughnessy*, 177 F. 2d 708, C. A. 2nd Cir., 1949;

Williamson v. *U. S.*, 184 F. 2d 280, C. A. 2nd Circ., JACKSON, *J.*, 1950;

Bridges v. *U. S.*, 184 F. 2d 881, C. A. 9th Circ., 1950.

II.

The respondent was improperly required to answer questions as to his Communist Party membership.

One of the main reasons for the ruling by the district court sustaining the action of the Attorney General is contained in Finding of Fact 16 (R. 12) reading as follows:

> "That the petitioner, while under cross-examination by the Chief Assistant United States Attorney, was a consistently evasive witness and his evasive demeanor in testifying in relation to his communistic activities convinces this Court that he is knowingly and wilfully participating in the Communist movement."

However, the respondent-appellee claimed his constitutional right against self-incrimination and, as the appellate court recognized, was not properly required to answer any questions as to membership or activities in the Communist Party (R. 92-3):

> "The district court seemed of the opinion that it was the duty of appellant to make such clear and convincing showing as would justify it in holding that the Attorney General or his subordinates had gone beyond the limit of sound discretion in denying bail and the court found that as a witness appellant

had ample opportunity to testify that he was not a member of the Communist Party or a part of the Communist movement at the date of his last arrest. While on the witness stand appellant claimed his conditional privilege against self-incrimination and upon that ground declined to testify touching his Communistic relations. We think that his refusal to testify should not have operated against him. *Blau* v. *United States* [340 U. S. 159], decided by the Supreme Court on Dec. 11, 1950."

See also:

Ballman v. *Fagin*, 200 U. S. 186;
Estes v. *Potter*, 183 F. 2d 865, C. A. 5th Circ., 1950, cert. denied 340 U. S. 920;
Alexander v. *U. S.*, 181 F. 2d 480, C. A. 9th Circ., 1950, cert. denied 340 U. S. 920;
U. S. v. *Weizman*, 111 F. 2d 260, 261, C. A. 2nd Circ., 1940;
U. S. v. *Zwillman*, 108 F. 2d 862, C. A. 2nd Circ., 1940.

Even without reference to respondent's right against self-incrimination it would seem most improper for the Government in a deportation case to require the non-citizen upon his preliminary application for bail to become involved in evidence concerned with Communist Party membership, the very issue upon which the deportation depends. Were the Government's contention sound, the alien would have to establish non-membership to secure release on bail in order to be free to prepare the main case on the very same issue.

As this Court stated in *Stack* v. *Boyle* (Docket No. 400, Nov. 5, 1951):

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of pun-

ishment prior to conviction. See *Hudson* v. *Parker*, 156 U. S. 277, 285 (1895)." (p. 3)

This was reiterated by Mr. Justice JACKSON in his concurring opinion, in more extended form:

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere acccusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." (p. 1)

III.

The respondent was not required to go forward with proof.

Whatever the application of the rule in the *Potash* case (*supra*) is to the original arrest and detention without bail of a non-citizen in deportation proceedings, it seems clear that where the Attorney General has already released such non-citizen on bail he must, in order thereafter to hold him without bail, make some showing of changed circumstances or of "danger to the public safety of his continued presence within the community" (169 F. 2d at 751).

In the case at bar there was no showing whatsoever of any change of circumstances. In the words of the appellate court (R. 92):

> "The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities."

In fact the respondent went forward with proof. The Court of Appeals summmarized the testimony in this favorable fashion (R. 92):

"Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army."

The petitioner in urging continued detention relies wholly on respondent's Communist Party membership (Brief, pp. 4-6). The previous deportation investigation and hearing had—on improper evidence to be sure—served to establish his connection with the Communist Party, but as Chief Judge Hicks wrote (R. 91-2):

"* * * If in the exercise of sound judgment upon whether appellant should have been continued in custody or have been released on bail, the Attorney General was limited to a consideration of the undisputed fact that appellant was a Communist, little may be urged against his decision in view of the preamble to the Internal Security Act of 1950. But we think that in determining whether appellant should have been granted or denied bail the Attorney General had a much wider latitude for decision.

"Discretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision in view of all the attending circumstances. *The Styria, Scopinich, Claimant* v. *Morgan*, 186 U. S. 1, 9. There are many circumstances which involve decision."

IV.

The respondent had a constitutionally protected right to bail.

The Eighth Amendment to the Constitution specifies that "excessive bail shall not be required," without limiting the statement to bail in criminal as against civil proceedings. The Solicitor General argues that this provision does not guarantee the right to bail but merely precludes "excessive bail" (Brief for the Petitioner, pp. 9-10).

Such a formulation overlooks the fact that outright denial of bail is more clearly "excessive bail" than fixing bail in however large an amount. Plainly the only reason why Congress has by statute provided that in capital cases bail is discretionary is to make clear that where the punishment for an offense is death, detention without bail does not necessarily constitute excessive bail. Whatever the rule in England may have been, or whatever the history of the bail statute in this country, it has generally been recognized that the constitutionally protected right against excessive bail guarantees not only the fixing of bail in a reasonable amount but *a fortiori* the fixing of bail. To say that the Constitution prohibits excessive bail but does not prohibit detention without bail is wholly without merit. Plainly the constitutional provision against excessive bail is designed to prevent a denial of bail.

There have been intimations in the deportation cases that the limitation of the Eighth Amendment applies to them at least in principle if not with the same precision as to criminal cases.

> *Potash* v. *District Director*, 169 F. 2d, at 752;
> *Klig* v. *Shaughnessy*, 94 F. Supp. 157, 159-60, RYAN, *J.*;
> *Cf. U. S.* v. *Motlow*, 10 F. 2nd 657, 659, C. A. 7th Circ., 1926, BUTLER, *J.*

In any event it is plain that as to both classes—those charged with crime (*Rubinstein* v. *Mulcahy*, 155 F. 2d 1002, 1004, C. A. 2nd Circ., 1946, and authorities cited) and those arrested for deportation (*Heikkinen* v. *Gordon*, 190 F. 2d 16; *Zydok* v. *Butterfield*, 187 F. 2d 802)—bail should be fixed, not as punishment but in an amount appropriate to insure the appearance of the individual when required. As Chief Judge GARDNER wrote in the *Heikkinen* case, *supra*:

> "The rules and rights of the parties in criminal and civil bail are similar in many respects" (190 F. 2d at 19).

CONCLUSION

The Court below, after a thorough study of the record now before this Court, held that (R. 93):

> "We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount."

The district court thereupon released the respondent on the $2,000 bail theretofore set by the Attorney General, and Zydok has appeared whenever his presence was sought. This Court should not interfere with that disposition.

Dated: November 19, 1951.

Respectfully submitted,

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